(7)

No. 03-636

Supreme Court, U.S.
FILED
JUN 3 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

CALIFORNIA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 27, 2003
CERTIORARI GRANTED MARCH 1, 2004

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The following opinion, decision, and order have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for a Writ of Certiorari:

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Decision Of The United States District Court For The Central District Of California Dated July 30, 2001 ..... 32a

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APPENDIX A — DOCKET OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHNSON V. ROWLAND, ET AL

01-56436

Court of Appeals Docket #: 01-56436
Filed: 8/22/01
Nsuit: 2550 Prisoner- civil rights (USdf)
Johnson v. Rowland, et al
Appeal from: Central District of California, Los Angeles

- -

Case type information:

1) prisoner petition
2) state
3) Civil rights

- -

Lower court information:

District: 0973-2: CV-95-01192-CBM
presiding judge: Consuelo B. Marshall, Chief Judge
court reporter: Dawn Bullock, Court Reporter
Date Filed: 2/24/95
Date order/judgment: 7/31/01
Date NOA filed: 8/9/01

- -

Fee status: paid

Appendix A

Prior cases:

95-55118 JTS MB null
Date filed: 2/2/95 Date disposed: 3/9/95
Disposition: jurdef/jdg

94-56374 null null null
Date filed: 10/19/94 Date disposed: 11/4/94
Disposition: cpc.dn/jdg

97-55063 JTS EL SRT
Date filed: 1/16/97 Date disposed: 3/17/97
Disposition: af/jdg

97-56308 DRT TGN AJK
Date filed: 9/26/97 Date disposed: 10/24/97
Disposition: cpc.dn/jdg

98-55076 null null null
Date filed: 1/16/98 Date disposed: 12/4/98
Disposition: 42-1/stf

98-55302 BBF DWN MB
Date filed: 2/20/98 Date disposed: 3/21/00
Disposition: af.rv/per

Current cases:

	Lead	Member	Start	End
companion:				
	01-56423	01-56436	8/22/01	
cross appeal:				
	01-56322	01-56423	8/21/01	
docketing link only:				
	98-55302	01-56322	8/9/01	

Docket as of March 9, 2004 11:15 pm

Appendix A

GARRISON S. JOHNSON
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v.

Appendix A

STATE OF CALIFORNIA Defendant - Appellee	Sara Turner, Esq. FAX 415 415/703-5712 Suite 11000 [COR LD NTC dag] AGCA - OFFICE OF THE CALIFORNIA ATTORNEY GENERAL (SF) 455 Golden Gate Ave. San Francisco, CA 94102-7004
JAMES H. GOMEZ, Director, Department of Corrections Defendant - Appellee	Sara Turner, Esq. (See above) [COR LD NTC dag]
JAMES ROWLAND Defendant - Appellee	Sara Turner, Esq. (See above) [COR LD NTC dag]

- -

01-56436

GARRISON S. JOHNSON

Plaintiff - Appellant

v.

STATE OF CALIFORNIA; JAMES H. GOMEZ,
Director, Department of Corrections;
JAMES ROWLAND

Defendants - Appellees

Appendix A

8/22/01	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): N. setting schedule as follows: appellant's designation of RT is due 8/20/01; appellee's designation of RT is due 8/29/01; appellant shall order transcript by 9/10/01; court reporter shall file transcript in DC by 10/9/01; certificate of record shall be filed by 10/16/01, for Consuelo B. Marshall; appellant's opening brief is due 11/26/01; appellees' brief is due 12/26/01; appellants' reply brief is due 1/8/02; [01-56436] (pg) [01-56436]
8/22/01	Filed representation statement of appellant by counsel Aaron P. Allan (CASEFILE) [01-56436] (pg) [01-56436]
8/22/01	Filed Aaron P. Alaln for Appellant Garrison S. Johnson in 01-56436 Civil Appeals Docketing Statement served on 8/9/01 (to CONFATT) [01-56436] [01-56436] (pg) [01-56436]
8/22/01	Prev 98-55302 BBF DWN MB TO ANY PANEL [01-56436] (aw) [01-56436]
9/11/01	Filed order Promo: (Deputy Clerk: jlc) Pla's mtn for voluntary dismissal of his appeal, 1-56423, under FRAP 42(b) is granted. A certified copy of this order sent to the dc shall act as and for mandate of this ct as to appeal No. 1-56423 only. Appeal No. 1-56436 shall proceed with the br sch as follows: the opening br and excs are due

Appendix A

11/26/01, the ans br is due 12/26/01, and the optional rpy br is due 14 days from service of the ans br. [01-56436] (gva) [01-56436]

9/19/01 Case rejected from Circuit Mediation Program. (sa) [01-16332 01-16495 01-16577 01-16612 01-16712 01-16723 01-16754 01-16798 01-35682 01-35742 01-35752 01-35772 01-55811 01-55902 01-56021 01-56249 01-56250 01-56273 01-56322 01-56401 01-56436 01-56437 01-56480]

11/27/01 Filed original and 15 copies Appellant Garrison S. Johnson opening brief (Informal: no) 30 pages and five excerpts of record in 1 vol; served on 11/26/01 [01-56436] (crw) [01-56436]

12/20/01 14 day oral extension by phone of time to file Appellee in 01-56436's brief. [01-56436] appellees' brief due 1/9/02, optional reply brief due 14 days from service of answering brief; (cb) [01-56436]

1/9/02 Filed original and 15 copies appellees 28 pages brief, & 5 copies of suppl EOC in 1 vol; served on 1/9/02 [01-56436] (mhf) [01-56436]

1/14/02 14 day oral extension by phone of time to file 's reply brief. [01-56436] appellants' reply brief due 2/6/02; (king) [01-56436]

Appendix A

2/7/02 Filed original and 15 copies Garrison S. Johnson in 01-56436 reply brief, (Informal: NO) 14 pages; served on 2/6/02 [01-56436] (mhf) [01-56436]

3/26/02 Calendar check performed [01-56436] (aw) [01-56436]

4/8/02 Calendar materials being prepared. [01-56436] [01-56436] (mw) [01-56436]

4/11/02 CALENDARED: PASA Jun 7 2002 900 am Courtroom 1 ** 9:30 am ** [01-56436] (aw) [01-56436]

5/10/02 Filed notice dated 5/9/02 of representation of Tanya Forsheit for aplt [01-56436] (mhf) [01-56436]

5/14/02 Filed order (Deputy Clerk: hh) For the convenience of the crt, this case is continued from the 6/7/02 calendar & will be rescheduled before the next available panel (Phoned csl: 9:55 & faxed to PANEL) [01-56436] (mhf) [01-56436]

7/16/02 Calendar check performed [01-56436] (aw) [01-56436]

7/29/02 Calendar materials being prepared. [01-56436] [01-56436] (rei) [01-56436]

7/31/02 CALENDARED: Pasadena Oct 10 2002 9:00 a.m. Courtroom 2 [01-56436] (th) [01-56436]

Appendix A

8/21/02 Filed certificate of record on appeal RT filed in DC: 10/16/01 [01-56436] (pg) [01-56436]

8/21/02 FILED CERTIFIED RECORD ON APPEAL IN: 3 clerk's records, 2 reporter's transcripts. From dc transmittals. [01-56436] (jk) [01-56436]

10/10/02 ARGUED AND SUBMITTED TO Procter R. HUG, Melvin BRUNETTI, Diarmuid F. O'SCANNLAIN [01-56436] (rmw) [01-56436]

2/25/03 FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Procter R. HUG; Melvin BRUNETTI; Diarmuid F. O'SCANNLAIN, author.) FILED AND ENTERED JUDGMENT. [01-56436] (hh) [01-56436]

3/11/03 Filed original and 50 copies Appellant Garrison S. Johnson pet for rhrg & pet for rhrg enbanc 16 p.pages, served on 3/10/03 (PANEL & ALL ACTIVE JUDGES) [01-56436] (mhf) [01-56436]

3/26/03 Filed order (Diarmuid F. O'SCANNLAIN): Aples are directed to file a response to aplt's pet for rhrg & pet for rhrg en banc filed on 3/11/03. The response shall be filed within 21 days of the date of this order, & aples will provide this crt with 50 copies. [01-56436] (mhf) [01-56436]

Appendix A

4/16/03 Filed Appellees State of California, et al., response to aplt's petition for panel rehearing with suggestion for rehearing en banc [4677875-1]; served on 4/16/03y (PANEL AND ALL ACTIVE JUDGES) [01-56436] (hh) [01-56436]

7/1/03 Filed aplt Garrison S. Johnson in 01-56436 additional citations, served on 6/26/03 (PANEL) [01-56436] (mhf) [01-56436]

7/28/03 Filed order (Procter R. HUG, Melvin BRUNETTI, Diarmuid F. O'SCANNLAIN): The panel has voted unanimously to deny the petition for rehearing. Judge O'Scannlain voted to deny the petition for rehearing en banc, and Judges Hug & Brunetti so recommended. The full court was advised of the Suggestion for Rehearing En Banc. A judge of this court requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. The petition & the Suggestion are thus DENIED. FERGUSON, Circuit Judge, with whom Circuit Judges Pregerson, D.W. Nelson, & Reinhardt join, dissenting from our court's denial of rehearing en banc [01-56436] (mhf) [01-56436]

8/4/03 Filed Appellant Garrison S. Johnson in 01-56436's motion to stay the mandate. served on 8/1/03 [Author] [01-56436] (mhf) [01-56436]

Appendix A

8/12/03 Filed order (Procter R. HUG, Melvin BRUNETTI, Diarmuid F. O'SCANNLAIN): Aplt's mtn to stay the mandate is GRANTED until 10/31/03 to permit aplt to file a petition for certiorari with the US Supreme Court. If before that date a petition for certiorari is filed, this stay shall remain in effect until final disposition by the Supreme Court. [01-56436] (mhf) [01-56436]

11/3/03 Received notice from Supreme Court: petition for certiorari Supreme Court No. #03-636 filed on 10/27/03. [01-56436] (mhf) [01-56436]

3/9/04 Filed Supreme Court order (SC Date: 3/1/04) The pet for a writ of ceritorari is GRANTED. (PANEL) [01-56436] (mhf) [01-56436]

APPENDIX B — DOCKET OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

GARRISON S JOHNSON V.
STATE OF CALIFORNIA, ET AL

CIVIL DOCKET FOR CASE #: 95-CV-1192

Filed: 02/24/95
Assigned to: Judge Consuelo B. Marshall
Jury demand: Defendant
Referred to: Magistrate Judge Brian Q. Robbins
Demand: $0,000
Nature of Suit: 550
Lead Docket: None
Jurisdiction: Federal Question
Dkt# in other court: None
Cause: 42:1983 Prisoner Civil Rights

GARRISON S JOHNSON
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(See above)
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Appendix B

2:95cv1192

GARRISON S JOHNSON

plaintiff

v.

THE STATE OF CALIFORNIA; JAMES ROLLAND; JOHN DOE; CALIFORNIA DEPARTMENT OF CORRECTIONS; JAMES GOMEZ, Director of the Department of Corrections; JAMES ROWLAND

defendant

- -

2/24/95	1	COMPLAINT (Summons(es) issued) (am) [Entry date 02/28/95]
2/24/95	—	CASE REFERRED to Magistrate Judge Brian Q. Robbins (am) [Entry date 02/28/95]
2/24/95	2	NOTICE and ORDER of Reference to Magistrate Judge Brian Q. Robbins (am) [Entry date 02/28/95]
2/24/95	3	ORDER granting lv to file action w/o prepayment of fees by Magistrate Judge Brian Q. Robbins (am) [Entry date 02/28/95]

Appendix B

3/6/95 4 MINUTES by Magistrate Judge Brian Q. Robbins: This case has been referred to Magistrate Judge Robbins for P/T proceedings. All future pleadings & correspondence shall be addressed to Clerk to Magistrate JudgeRobbins. See document re preparing & submitting pleadings & correspondence. CR: n/a. (gk) [Entry date 03/10/95]

3/6/95 5 ORDER by Magistrate Judge Brian Q. Robbins that the U.S. Marshal is auth to proceed w/ svc of process upon James Rolland, Director of California Dept. of Corrections in his individual capacity only, w/o prepayment of costs, until fur ord of Crt. (gk) [Entry date 03/10/95]

3/6/95 6 ORDER by Magistrate Judge Brian Q. Robbins that within 20 days of the date of this Ord, plf shall file w/ the crt a ntc that all required documents have been submitted to the U.S. Marshal Service. (gk) [Entry date 03/10/95]

3/9/95 7 MOTION/APPLICATION by plf Garrison S. Johnson for an ord directing the U.S. Marshal to effect svc w/o payment of fees. (gk) [Entry date 04/04/95]

4/17/95 8 MOTION OR APPLICATION by plf Garrison S. Johnson for an ord directing the U.S. Marshal to effect svc w/o the payment of fees. (gk) [Entry date 04/26/95]

Appendix B

4/18/95 9 NOTICE by plf Garrison S. Johnson of submission of documents to U.S. Marshal. (gk) [Entry date 04/26/95]

5/30/95 11 MOTION by plf Garrison S. Johnson for leave to amend complaint. (gk) [Entry date 06/10/95]

6/5/95 10 RETURN OF ORIGINAL SUMMONS and RETURN OF USM 285 of summons & complaint served upon James Rolland (individual capacity) by mail on 5/18/95; w/ waiver of svc of sms by Sara Turner, as atty of record for dft James Rowland, sent by U.S. Marshal's Office on 4/20/95 & acknowledged on 5/18/95. (gk) [Entry date 06/06/95]

6/7/95 14 MINUTES by Magistrate Judge Brian Q. Robbins: Crt is in receipt of plf's motion for leave to amend complaint [11-1]. Plf is hereby GR lv to file a 1st A/C. Plf has 23 days from the date of this Ord to file a 1st A/C. CR: n/a. (gk) [Entry date 06/30/95]

6/19/95 12 NOTICE OF MOTION AND MOTION by dft James Rowland to dismiss; motion hearing set for 3:00 7/25/95; memo of PA in suppt thereof. (gk) [Entry date 06/30/95]

6/21/95 13 MINUTES by Magistrate Judge Brian Q. Robbins: Hrg date on dft's motion to dismiss [12-1] is VACATED. On 6/12/95 crt issued a minute ord allowing plf to file a 1st A/C, due

by 7/5/95. Thus, dft's mot to dismiss is deemed moot. Dft may if he wishes renew his mot to dism after svc of the 1st A/C. CR: n/a. (gk) [Entry date 06/30/95]

6/23/95 15 FIRST AMENDED COMPLAINT [1-1] by plf Garrison S. Johnson; terminating dfts James Rolland & John Does; adding dfts California Department of Corrections & James Gomez. (gk) [Entry date 07/07/95]

6/23/95 17 MOTION by plf Garrison S. Johnson for svc of cmp by U.S. Marshal. (gk) [Entry date 07/18/95]

7/3/95 16 FIRST AMENDED COMPLAINT [15-1] by plf Garrison S. Johnson; terminating dft CA Dept of Corrections; adding dft Jame Rowland. (gk) [Entry date 07/07/95]

7/10/95 18 MINUTES by Magistrate Judge Brian Q. Robbins: Crt is in receipt of a document fld by plf on 7/3/95 entitled "1st A/C." Plf fld a 1st A/C on 6/23/95. Plf is advised that if plf wants to amend the cmp fld on 6/23/95 he ask lv of the Crt to file a 2nd A/C. Plf is ORD to provide a stat rpt to this Crt within 21 days indicating whether he wishes to proceed on the 1st A/C of 6/23/95 or whether he wishes to amend his cmp. CR: n/a. (gk) [Entry date 07/18/95]

7/24/95 19 MINUTES by Magistrate Judge Brian Q. Robbins: Crt is in receipt of a document fld by plf entitled "stat rpt" & "mot for lv to amend cmp." Plf is GR 30 days from the date of this Ord to file a 2nd A/C. CR: n/a. (gk) [Entry date 07/31/95]

8/1/95 20 STATUS REPORT by plf Garrison S. Johnson. (gk) [Entry date 08/05/95]

8/8/95 21 SECOND AMENDED COMPLAINT [16-1] by plf Garrison S. Johnson. (gk) [Entry date 08/14/95]

8/31/95 22 NOTICE OF MOTION AND MOTION by dft Rowland to dismiss; motion hearing set for 3:00 9/26/95; memo of PA in suppt thereof. (gk) [Entry date 09/13/95]

9/5/95 23 MOTION by plf Garrison S. Johnson requesting court to order dfts to resp to plf's 2nd A/C. (gk) [Entry date 09/13/95]

9/5/95 24 MINUTES by Magistrate Judge Brian Q. Robbins: Crt is in receipt of a document fld by plf entitled "2nd A/C." Crt will accept the 2nd A/C. Plf is advised that he must properly serve the 2nd A/C on dfts. CR: n/a. (gk) [Entry date 09/13/95]

Appendix B

9/18/95	25	NOTICE OF MOTION AND MOTION by plaintiff Garrison S Johnson req svc by usm (kr) [Entry date 09/22/95]
9/28/95	26	OPPOSITION by plf Garrison S. Johnson to dft's motion to dismiss in suppt of aff [22-1]. (gk) [Entry date 10/05/95]
10/6/95	27	ORDER by Magistrate Judge Brian Q. Robbins vacating hearing re motion to dismiss [22-1] was fld by dft Rowland. ORD tht the rply be fld NLT 10-17-95. (es) [Entry date 10/18/95]
10/19/95	28	Reply to plf's opposition by defendant James Rowland to motion to dismiss [22-1] (es) [Entry date 10/23/95]
11/22/95	29	NOTICE OF MOTION AND MOTION by plaintiff Garrison S Johnson for order directing the US Marshal to svc deft; motion hearing set for (jc) [Entry date 12/04/95]
1/9/96	30	REQUEST by plaintiff Garrison S Johnson for Waiver of Sms (jc) [Entry date 01/12/96]
1/22/96	31	NOTICE OF MOTION AND MOTION by plaintiff Garrison S Johnson for stat rpt; motion hearing set for (jc) [Entry date 01/24/96]

Appendix B

1/23/96	32	ORDER by Chief Judge Wm. M. Byrne, Pur to the recommended procedure adopted by the Crt for the creation of the cal of Judge Kim McLane Wardlaw, Case transferred frm the cal of Judge Gadbois, Jr., to the cal of Judge Kimberly M. Wardlaw for all further proceedings. Case shld now read CV 95-1192 KMW (BQR). (es) [Entry date 01/24/96]
4/23/96	33	MOTION by plaintiff Garrison S Johnson for order requesting Dist Judge to issue an ord in this case for reason stated herein. (ab) [Entry date 04/24/96]
6/18/96	34	MINUTES: granting motion for order directing the US Marshal to svc deft [29-1]; The svc shl be solely on Mr James gomez who is the only named deft in the the 1st A/C; the defense my refi a mtn to dism based solely on pltf's 1st A/C. Deftf's previous motion to dismiss [22-1] moot. by Magistrate Judge Brian Q. Robbins CR: n/a (jc) [Entry date 06/24/96]
7/15/96	35	ORDER by Magistrate Judge Brian Q. Robbins dismissing the complaint [21-1]. Plf sh w/i 23 dys fr the dt of entry of this order, file an amnded cmp. It should be labeled Third Amnded Cmp. It should in no way refer to 2nd amnded cmp. (ENT 7/17/96), mld cpys & ntcs. (tw) [Entry date 07/17/96]

Appendix B

8/1/96	36	3RD AMENDED COMPLAINT [16-1] by plaintiff Garrison S Johnson (jc) [Entry date 08/05/96]
8/22/96	37	NOTICE OF MOTION AND MOTION by defendant James Rowland to dismiss Third A/C for failure to state cause of action and barred by statute of limitations ; motion hearing set for 3:00 9/24/96 (th) [Entry date 08/26/96] [Edit date 08/26/96]
8/22/96	38	MEMORANDUM of points and authorities by defendant James Rowland in support of motion to dismiss Third A/C [37-1] (th) [Entry date 08/26/96]
8/22/96	39	REQUEST by defendant James Rowland for JUDICIAL NTC (jc) [Entry date 08/26/96]
8/29/96	40	ORDER by Magistrate Judge Brian Q. Robbins vacating hearing re motion to dismiss Third A/C for failure to state cause of action and barred by statute of limitations [37-1]; Opp or stmt of non opp be fi nlt 9/12/96; Rply fi nlt 9/19/96 (jc) [Entry date 09/09/96]
9/4/96	42	ORDER by Magistrate Judge Brian Q. Robbins; tht US Marshal is auth to proc w/ svc of process upon dfts ONLY w/o prepayment of cost until fur ord of the crt; James Gomez, Dire of Corr, individually & James Roland, Fomer Dir, individually (jc) [Entry date 09/16/96]

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9/9/96	41	OPPO by plaintiff Garrison S Johnson to motion to dismiss Third A/C for failure to state cause of action and barred by statute of limitations [37-1], motion req svc by usm [25-1] (jc) [Entry date 09/10/96]
9/19/96	43	RPLY TO OPP by defendant James Rowland to motion to dismiss Third A/C for failure to state cause of action and barred by statute of limitations [37-1] (jc) [Entry date 09/20/96]
9/23/96	44	NOTICE by plaintiff Garrison S Johnson of submission of docs to U.S. Marshal (np) [Entry date 10/03/96]
11/27/96	45	NOTICE OF MOTION AND MOTION by defendant James Gomez to dismiss third amended cmp; motion hearing set for 3:00 1/7/97 (shb) [Entry date 12/03/96]
11/27/96	46	MEMORANDUM of PA by defendant James Gomez in support of motion to dismiss third amended cmp [45-1] (shb) [Entry date 12/03/96]
12/2/96	47	ORDER by Magistrate Judge Brian Q. Robbins vacating hearing re motion to dismiss third amended cmp [45-1], Opp nlt 12/18/96, rply nlt 1/2/97 (dmjr) [Entry date 12/04/96]

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12/9/96	48	WAIVER OF SERVICE of SUMMONS by defendant James Rowland sent by plf on 10/1/96 by Sara Turner, atty, USM retn (dmjr) [Entry date 12/10/96]
12/9/96	49	WAIVER OF SERVICE of SUMMONS by defendant James Gomez sent by plf on 10/1/96 by Sara Turner, atty; USM retn (dmjr) [Entry date 12/10/96]
12/13/96	50	OPPOSITION by plaintiff motion to dismiss third amended cmp [45-1] (dmjr) [Entry date 12/16/96]
12/17/96	51	Ret RECEIPT of Proof of del of ord dtd 12/2/96 by legal mail rec by - illegible sign, on 12/6/96. (lori) [Entry date 12/18/96] [Edit date 12/18/96]
1/3/97	52	REPLY by defendant James Gomez to response to motion to dismiss third amended cmp [45-1] (dmjr) [Entry date 01/06/97]
3/14/97	53	MOTION by plaintiff Garrison S Johnson for appointment of counsel (jag) [Entry date 03/18/97]
3/14/97	54	MOTION by plaintiff Garrison S Johnson for svc of amd cmp upon dfts Peter Stamison & Bert Roberts by US Marshal (jag) [Entry date 03/18/97]

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3/14/97	55	MOTION by plaintiff Garrison S Johnson for leave to file amd cmp (jag) [Entry date 03/18/97]
3/18/97	56	MINUTES: Plf's motion for appointment of counsel [53-1] is DENIED. by Magistrate Judge Brian Q. Robbins CR: n/a (jag) [Entry date 03/20/97]
3/20/97	57	MINUTES: Plf's motion for leave to file amd cmp [55-1] is DENIED w/out prej. Plf may renew his mot after the crt has ruled on the currently pending mot to dism fld by dfts in this actn. by Magistrate Judge Brian Q. Robbins CR: n/a (jag) [Entry date 03/24/97]
7/1/97	58	REPORT AND RECOMMENDATION of U.S. Magistrate Judge Brian Q. Robbins that Crt ent an ord granting dfts' mots to dism & dism pla's 3rd A/C w/prej. (dh) [Entry date 07/07/97]
7/2/97	59	NOTICE OF FILING REPORT AND RECOMMENDATION of U.S. Magistrate Judge Brian Q. Robbins and lodging of proposed judgment &/or ord (dh) [Entry date 07/07/97]
7/14/97	60	OBJECTIONS by plaintiff Garrison S Johnson to Report and Recommendation [58-1] (jag) [Entry date 07/16/97]

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11/14/97	61	MOTION by plaintiff Garrison S Johnson requesting final judgment (jag) [Entry date 11/18/97]
1/8/98	62	ORDER by Judge Kim M. Wardlaw adopting report and recommendation motion NOTICE OF FILING REPORT AND RECOMMENDATION [59-1] (ENT 1/9/98) mld cpys (bp) [Entry date 01/09/98] [Edit date 01/09/98]
1/8/98	63	JUDGMENT AND ORDER: It is ADJUDGED that the dft's mots to dismiss are granted, and that pla's third amd cmp is dismissed without lv to amd by Judge Kim M. Wardlaw terminating case NUNC PRO TUNC 8/12/97 (ENT 1/9/98) MD JS-6 mld cpys & ntc. (bp) [Entry date 01/09/98]
1/20/98	64	NOTICE OF APPEAL by plaintiff Garrison S Johnson to 9th C/A from Dist. Court Jgm & Ord fld 1/8/98 & ent 1/9/98 (cc: Garrison S. Johnson; State Attorney General) Fee: Billed. (pjap) [Entry date 02/03/98]
2/11/98	65	TRANSCRIPT DESIGNATION and ordering form. (ghap) [Entry date 02/17/98]
3/6/98	66	NOTIFICATION by Circuit Court of Appellate Docket Number appeal [64-1] 98-55302 (weap) [Entry date 03/06/98]

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3/17/98	67	MINUTES:ntc of referral; the attached ntc of referral directed to Judge Wardlaw by the US Crt of appeals is being ref to Mag Judge Robins for his recommendation by Judge Kim M. Wardlaw CR: none (ab) [Entry date 03/19/98]
3/31/98	68	ORDER re CERT OF APPEALABILITY by Judge Kim M. Wardlaw; Crt has reviewed the matter, It is ordered that the Cert of Appealability [64-1] is DENIED. There has been no substantial showing of the denial of a constitutional right. (ENT 4/2/98). mld cpys & ntcs. (jag) [Entry date 04/02/98]
7/14/98	69	9thcca Order: Appellant's mot for appointment of cnsl is den. Appellant's mot for a certificate of probable cause is den as unnecessay. (weap) [Entry date 07/27/98]
12/2/98	70	CERTIFICATE of Record Transmitted to USCA (98-55302) (cc: all parties) (pjap) [Entry date 12/02/98]
12/2/98	—	CLERK'S record on appeal transmitted to Circuit vols: 1 (pjap) [Entry date 12/02/98]
4/17/00	—	LODGED cc 9th CCA Ord: Jgm of said Dist Crt hereby is affirmed in part & remanded in part. Each pty shll bear their own costs. (98-55302) (FWD TO CRD) (pjap) [Entry date 04/27/00]

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4/28/00 71 NOTICE OF REASSIGNMENT Of Case Upon Rcpt of Mandate Frm The Ninth Circuit Crt of Appeals. Case randomly reassgned to Judge Consuelo B. Marshall for all fur procdngs. Case no. now reads as CV 95-1192 CBM (BQR) (cc: all counsel) (rn) [Entry date 05/01/00]

5/10/00 72 MINUTES: In its decision, the 9th CCA has dir tht the Dist Crt shl req the appt of pro bono cnsl. The US Mag Judge has on 5/8/00 requested the appt of said pro bono cnsl from the US Mag Judge coordinating the pro bono cnsl prog. The Crt will issue a fur ord setting a status conf in this mttr at the ti tht pro bono cnsl is designated by Magistrate Judge Brian Q. Robbins (pbap) [Entry date 05/12/00]

5/16/00 73 MANDATE from Circuit Court of Appeals affirming in part & reversing in part is filed & spread on the minutes of this crt (dmjr) [Entry date 05/17/00]

5/16/00 74 CERTIFIED COPY of judgment from USCA affirming in part & rrmanding in part, each party s/bear own costs (ENT 5/17/00) (cc: all counsel) (dmjr) [Entry date 05/17/00]

5/16/00 75 RECORD on appeal returned from U.S. Court of Appeals vols: 1 (pjap) [Entry date 06/14/00]

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6/19/00 76 ATTORNEY SUBSTITUTION: terminating attorney Garrison S Johnson for Garrison S Johnson by plaintiff Garrison S Johnson and substituting attorney Kenneth Ingber by Judge Consuelo B. Marshall (pbap) [Entry date 06/22/00]

7/5/00 78 FOURTH AMENDED COMPLAINT [36-1] by plaintiff Garrison S Johnson; jury demand. Summons smms issd (pbap) [Entry date 07/12/00]

7/5/00 79 Certification OF INTERESTED PARTIES filed by plaintiff Garrison S Johnson (pbap) [Entry date 07/12/00]

7/11/00 77 MINUTES: Kenneth S. Ingber, Esq. having substituted in as cnsl of record in this mttr on 6/19/00, ORD cnsl for plf and cnsl for dft to appear for ; status conference set on 3:00 8/9/00 by Magistrate Judge Brian Q. Robbins (pbap) [Entry date 07/11/00]

7/11/00 80 NOTICE OF DISCREPANCY AND ORDER by Magistrate Judge Brian Q. Robbins Plf's 4th A/C w/summons; cert as to int ptys rcvd o n 7/5/00 are to be fld and processed. (pbap) [Entry date 07/12/00]

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7/20/00	81	PROOF OF SERVICE executed upon defendants James Rowland, James H Gomez on 7/17/00 by US Mail by delivering 4th A/C to Sara Turner Esq, California Attorney General & Barbara C Spiegel Esq, Attorney General's Office (ad) [Entry date 07/21/00]
8/3/00	83	ANSWER filed by defendant James Rowland, defendant James Gomez to 4th amended complaint [78-1]; jury demand (pbap) [Entry date 08/09/00]
8/7/00	82	PROOF OF SERVICE executed upon defendant State of CA on 8/1/00 by personal svc by delivering sums, 4th A/C to Silvia Francisco, Legal Analyst auth to accept svc (jp) [Entry date 08/08/00]
8/7/00	150	NOTICE OF DISCREPANCY AND ORDER by Magistrate Judge Brian Q. Robbins ordering Gomez & Rowland's ans to cmp submitted by defendant James Rowland, defendant James Gomez received on 8/3/00 to be fld and processed; fld date to be the date the doc was stamped "received but not fld" w/the Clerk (pbap) [Entry date 05/03/02]
8/16/00	84	REQUEST by defendant James Rowland, defendant James Gomez for lv to take the depo of plf, a person confined in state prison. (pbap) [Entry date 08/18/00]

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8/16/00	—	LODGED/PROPOSED ORDER submitted (FWD TO CRD) (pbap) [Entry date 08/18/00]
8/21/00	85	ORDER by Magistrate Judge Brian Q. Robbins declined motion request [84-1] (pbap) [Entry date 08/23/00]
8/22/00	87	JOINT REPORT OF EARLY MEETING OF COUNSEL filed. Estimated length of trial 2-3 days (pbap) [Entry date 08/25/00]
8/22/00	88	MINUTES: status hrg hld on 8/9/00 by Magistrate Judge Brian Q. Robbins CR: n/a (dmjr) [Entry date 08/25/00]
8/24/00	86	STIPULATED SCHEDULING ORDER by Magistrate Judge Brian Q. Robbins; discovery ddl set on 12/8/00; fur status conference set on 3:00 1/19/01 (pbap) [Entry date 08/25/00]
8/25/00	89	2ND REQUEST by defendant James Gomez, defendant James Rowland for lv to take the depo of plf, a person confined in state prison. (pbap) [Entry date 08/29/00]
8/30/00	90	MINUTES: granting motion request [89-1]; IN COURT HEARING RE: sched set on 10:30 10/5/00 by Magistrate Judge Brian Q. Robbins**see min ord for addtnl info** (pbap) [Entry date 08/30/00]

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1/19/01	92	MINUTES: mandatory status conference held Cnsl enter their appearance. For the reasons stated on the record, cnsl are to lodge with the crt a stip re the continuance of the previous dates set. by Magistrate Judge Brian Q. Robbins CR: n/a (shb) [Entry date 01/24/01]
1/23/01	91	STIPULATION and ORDER by Magistrate Judge Brian Q. Robbins; discovery ddl set on 3:00 1/19/01; motion filing ddl set on 3:00 1/19/01 (shb) [Entry date 01/24/01]
2/7/01	93	STIPULATION and ORDER by Magistrate Judge Brian Q. Robbins; discovery ddl set on 3/19/01; motion filing ddl set on 4/9/01 (pbap) [Entry date 02/12/01]
4/9/01	94	NOTICE of lodgement of depo transcript of Plf Garrison S. Johnson in suppt of Mot for Summary Jgm by defendants; Ldg (1) Vol depo transcript (ir) [Entry date 04/09/01]
4/9/01	95	NOTICE OF MOTION AND MOTION by S Cambra, dfts James Rowland, James Gomez, for summary judgment purs to Rule 56 FRCP; motion hearing set for 10:00 5/7/01; Lodged proposed orders (dw) [Entry date 04/12/01] [Edit date 04/17/01]
4/9/01	96	MEMORANDUM PA IN SUPPORT by S Cambra, dfts James Rowland, James Gomez of motion for summary judgment [95-1] (dw) [Entry date 04/12/01] [Edit date 04/17/01]

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4/9/01	97	NOTICE OF MOTION AND MOTION by plaintiff Garrison S Johnson for summary adjudication of his 2nd & 3rd clm for relief; motion hearing set for 10:00 5/7/01; Lodged Stmt & Ord (mch) [Entry date 04/12/01]
4/9/01	98	MEMORANDUM OF P/A by plaintiff Garrison S Johnson in suppt of motion for summary adjudication of his 2nd & 3rd clm for relief [97-1] (mch) [Entry date 04/12/01]
4/9/01	99	DECLARATION of Jeff Garcia Hilger by plaintiff Garrison S Johnson in suppt of motion for summary adjudication of his 2nd & 3rd clm for relief [97-1] (mch) [Entry date 04/12/01]
4/9/01	100	PROOF OF SERVICE by plaintiff Garrison S Johnson on 4/9/01 of Ntc of Mot & Mot by plf Garrison Johnson for Summary Adjudication of his 2nd & 3rd clm for relief; Memo of P/A in suppt (see doc for fur details) (mch) [Entry date 04/12/01]
4/10/01	101	AMENDED DECLARATION OF SERVICE on 4/9/01 of Propsd Ord Granting Dfts' Mot for S/J (mch) [Entry date 04/12/01]
4/10/01	102	AMENDED DECLARATION OF SERVICE on 4/9/01 of Stmt of Uncontroverted Fact & Conclusions of Law (mch) [Entry date 04/12/01]

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4/10/01 103 AMENDED DECLARATION OF SERVICE on 4/9/01 of Dfts' Memo of P/A in Suppt of Motion for S/J (mch) [Entry date 04/12/01]

4/10/01 104 AMENDED DECLARATION OF SERVICE on 4/9/01 of Dfts' Ntc of Motion for S/J (mch) [Entry date 04/12/01]

4/12/01 105 ORDER by Magistrate Judge Brian Q. Robbins re compliance with FED.R.CIV.P. 56 and Local Rule 7.14. (pbap) [Entry date 04/13/01]

4/23/01 106 NOTICE OF MOTION AND MOTION by plaintiff Garrison S Johnson to strike certain decls & exhs offered in suppt of dfts' mot for summary jgm; motion hearing set for 10:00 5/7/01; memo of evidentiary objections (ir) [Entry date 04/24/01]

4/23/01 107 MEMORANDUM of PA filed by plaintiff Garrison S Johnson in opposition to dfts' motion for summary judgment [95-1] (ir) [Entry date 04/24/01]

4/23/01 108 RESPONSE by plaintiff to dfts' stmt of uncontroverted fact & stmt of genuine iss in suppt of motion for summary judgment [95-1] (ir) [Entry date 04/24/01]

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4/23/01 109 OPPOSITION by defendant James Rowland, defendant James Gomez and S. Cambra to motion for summary adjudication of his 2nd & 3rd clm for relief [97-1] (pbap) [Entry date 04/25/01]

4/25/01 110 MINUTES: The Crt hereby strikes Plf's motion for summary adjudication of his 2nd & 3rd clm for relief [97-1] for the failure to comply w/Local Rule 7.4.1 by Judge Consuelo-B. Marshall CR: n/a (SEND) (ir) [Entry date 04/25/01]

4/25/01 111 MINUTES: (IN CHAMBERS) The Crt is in receipt of plf's doc entitled motion to strike certain decls & exhs offered in suppt of dfts' mot for summary jgm [106-1] & dft's "opp to Plf's mot for summary adjudication of iss" fld on 4/23/01 & set for hrg on 5/7/01 @ 10:00. THE HEARING DATE IS HEREBY VACATED. The hrg will be held on 5/18/01 @ 3:00 before US Mag Judge by Magistrate Judge Brian Q. Robbins (SEND) (ir) [Entry date 04/26/01]

4/27/01 116 JNT RENOTICING OF MOTION by plaintiff Garrison S Johnson for summary adjudication of issues and dfts's mot for summ jgm; motion hearing set for 10:00 5/7/01 Lodged ord (pbap) [Entry date 05/02/01]

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4/30/01 112 REPLY by defendants J Rowland, J Gomez & S Cambra to Plf's opp to dfts' motion for summary judgment [95-1] (ir) [Entry date 05/01/01]

4/30/01 113 REPLY by plaintiff Garrison S Johnson to dfts' opp to Plf's motion for summary adjudication of his 2nd & 3rd clm for relief [97-1] (ir) [Entry date 05/01/01]

4/30/01 114 EVIDENTIARY OBJECTIONS by plaintiff Garrison S Johnson to decls submitted in opp to Plf's motion for summary adjudication of his 2nd & 3rd clm for relief [97-1] (ir) [Entry date 05/01/01]

5/1/01 115 EVIDENTIARY OBJECTIONS to decl of Pelican Bay State Prison Associate Warden B. O'Neil submitted in reply to Plf's opp to dfts' motion for summary judgment [95-1] fld by Plf Garrison S Johnson (ir) [Entry date 05/02/01]

5/4/01 117 ORDER by Judge Consuelo B. Marshall resetting hearing on motion for summary adjudication of issues and dfts's mot for summ jgm [116-1] 10:00 6/4/01 (dmjr) [Entry date 05/07/01]

5/22/01 118 RESPONSE by defendants to plf's statement of uncontroverted fact & conclusions of law (jp) [Entry date 05/25/01]

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5/22/01 119 OPPOSITION by defendants to plf's motion to strike certain decls & exhs offered in suppt of dfts' mot for summary jgm [106-1] (jp) [Entry date 05/25/01]

5/29/01 121 MINUTES: that the motion for summary adjudication of issues and dfts's mot for summ jgm [116-1] is submitted; motion hearing off-cal, that the motion for summary judgment [95-1] is submitted; motion hearing off-cal by Judge Consuelo B. Marshall CR: n/a (dmjr) [Entry date 05/31/01]

5/30/01 120 MINUTES: referring motion for summary adjudication of issues and dfts's mot for summ jgm [116-1] to Judge Harry L. Hupp, setting hearing on motion for summary adjudication of issues and dfts's mot for summ jgm [116-1] 10:00 6/11/01 by Judge Consuelo B. Marshall CR: n/a (dmjr) [Entry date 05/31/01]

6/11/01 122 MINUTES: Proceedings: Cross-mots for s/j. The matter has been transferred to this court for the hrg of these motions only. All further proceedings will be before Judge Marshall. Plf's mot for partial summ jgm is denied, the court findings trialable issue of fact on 2d claim and that dfts are entitled to summ jgm on the conspiracy claim. The mot of dfts Gomez, Rowland, and Cambra are granted as to claims 1 (8th Amendment) and 3

(conspiracy) and denied as to claim 2 (Equal Protection). Fur, the mot of said dfts for dismi based on qualified immunity is denied. This min ord is the crt's order on these motions. No more formal order is necessary. (ENT 6/14/01) mld cpys & ntc **see min ord for addtional info** re [116-1] by Judge Harry L. Hupp CR: Cynthia L. Mizell (pbap) [Entry date 06/14/01]

6/25/01 123 NOTICE OF MOTION AND MOTION by defendant S Cambra, defendant James Rowland, defendant James Gomez for reconsider of denial of qualified immunity; motion hearing set for 10:00 7/30/01 Lodged prop ord (pbap) [Entry date 06/27/01]

6/25/01 — LODGED/PROPOSED ORDER submitted (FWD TO CRD) (pbap) [Entry date 06/27/01]

6/25/01 124 DECLARATION of cnsl by defendant James Rowland, defendant James Gomez, defendant S. Cambra (pbap) [Entry date 06/27/01]

6/25/01 125 MEMORANDUM IN SUPPORT by defendants of motion for reconsider of denial of qualified immunity [123-1] (pbap) [Entry date 06/27/01]

6/27/01 126 MINUTES: setting hearing on motion for reconsider of denial of qualified immunity [123-1] 10:00 7/30/01 by Judge Harry L. Hupp CR: na (dmjr) [Entry date 06/29/01]

6/28/01 127 MEMORANDUM OF PA IN OPPOSITION by plf Garrison S. Johnson to dfts' motion for reconsideration [123-1]. (gk) [Entry date 07/03/01]

6/28/01 128 AMENDED NOTICE by dfts J. Rowland and J. Gomez of mot & mot for reconsideration of denial of qualified immunity. (gk) [Entry date 07/03/01]

7/13/01 129 NOTICE OF APPEAL by defendant James Rowland, defendant James Gomez to 9th C/A from Dist. Court min ord fld 6/11/01, ent 6/14/01 [122-1] (cc: Sara E. Turner, Dep Atty Gen; Proskauer, Rose LLP) Fee: Billed. (wdc) [Entry date 07/16/01]

7/13/01 130 REPRESENTATION STATEMENT re appeal [129-1]. (wdc) [Entry date 07/16/01]

7/19/01 — Appeal Fee Paid re [129-1] fee in amount of $105.00. (weap) [Entry date 07/19/01]

7/23/01 131 REPLY by defendant to response to motion for reconsider of denial of qualified immunity [123-1] (dmjr) [Entry date 07/26/01]

7/30/01 132 MINUTES: granting motion for reconsider of denial of qualified immunity [123-1] as to dfts James Rowland and James H. Gomez. The action is dism as to said dfts on the basis of qualified immunity by jgm signed and filed

this date by Judge Harry L. Hupp CR: Cynthia L. Mizell. (ENT 7/31/01) mld cpys & ntc (pbap) [Entry date 07/31/01]

7/30/01 133 ORDER by Judge Harry L. Hupp granting motion for reconsider of denial of qualified immunity [123-1]. ORD that Dfts Rowland and Gomez are entitled to qualified immunity and that summ jgm be entered in favor of Dfts Jamez ah. Gomez and James Rowland and against Plf and this action be dismissed as to dfts Gomez and Rowland with prej forthwith. (ENT 7/31/01) mld cpys & ntc (pbap) [Entry date 07/31/01]

8/6/01 134 NOTICE OF APPEAL by plaintiff Garrison S Johnson to 9th C/A from Dist. Court Mins fld 6/11/01 & ent 6/14/01 [122-1], Ord fld 7/30/01 & ent 7/31/01 [15-1], Mins fld 7/30/01 & ent 7/31/01 [16-1] (cc: Garrison S. Johnson; Sara Turner; Deputy Atty Gen) Fee: Billed (weap) [Entry date 08/09/01]

8/9/01 135 NOTICE OF APPEAL by plaintiff Garrison S Johnson to 9th C/A from Dist. Court Ord fld 7/30/01 & ent 7/31/01 [133-1] (cc: Aaron P. Allan, Proskauer Rose, LLP; Bill Lockyer, Paul D. Gifford, Deputy Attorney General) Fee: Paid. (pjap) [Entry date 08/09/01]

8/9/01 136 REPRESENTATION STATEMENT re appeal [135-1] (pjap) [Entry date 08/09/01]

8/16/01 137 Appellant's Notice of request for transcript & Statement of Issues on appeal (dl) [Entry date 08/17/01]

8/20/01 138 NOTIFICATION by Circuit Court of Appellate Docket Number appeal [129-1] 01-56322 (dl) [Entry date 08/20/01]

8/23/01 139 NOTIFICATION by Circuit Court of Appellate Docket Number appeal [134-1] 01-56423 (weap) [Entry date 08/23/01]

8/23/01 140 NOTIFICATION by Circuit Court of Appellate Docket Number appeal [135-1] 01-56436. (wdc) [Entry date 08/23/01]

8/27/01 — LODGED CC 9th CCA ORDER Applnt's mot for voluntary dism gr. App dism. (01-56322) (FWD TO CRD). (cbr) [Entry date 08/30/01]

8/29/01 141 MANDATE from Circuit Court of Appeals dismissing the appeal is filed & spread on the minutes of this crt (dmjr) [Entry date 08/30/01]

8/29/01 142 CERTIFIED COPY of Appellate Court Order: dismissing the appeal [129-1] (dmjr) [Entry date 08/30/01]

9/10/01 143 TRANSCRIPT DESIGNATION and ordering form for dates: 6/11/01, 7/30/01 CR: Cynthia L. Mizell. (wdc) [Entry date 09/13/01]

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9/17/01 — LODGED CC 9th CCA ORDER Plf's mot for voluntary dism of his app 01-56423 under FRAP 42(b) is GR. App No. 01-56436 shall proceed w/briefing sched as follows: opening brief & excerpts of record due 11/26/01, answering brief due 12/26/01 & optional reply brief due 14 days from svc of answering brief. (01-56423, 01-56436) (FWD TO CRD) (pjap) [Entry date 09/27/01]

9/21/01 144 CERTIFIED COPY of Appellate Court Order: dismissing the appeal No. 01-56426 [134-1] (shb) [Entry date 09/26/01]

9/21/01 145 MANDATE from Circuit Court of Appeals The court orders that the mandate of the Ninth Circuit Court of Appeals dismissing appeal is hereby filed and spread upon the minutes of this US District Court. THe record reflects that costs of th eprevailing party were taxed by the Court of Appeals for the Federal CIrcuit in the amount of $554.42 on 8/23/00 (shb) [Entry date 09/26/01]

9/21/01 146 MINUTES: req to proceed on apppeal ifp is referred to Mag Robbins by Judge Consuelo B. Marshall CR: n/a (dmjr) [Entry date 09/27/01]

10/16/01 147 RECEIPT OF TRANSCRIPT of proceedings for the following date(s): 6/11/01, 7/30/01 (Re: [135-1]) CR: Cynthia Mizell (weap) [Entry date 10/17/01]

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10/16/01 — TRANSCRIPT filed for proceedings held on 6/11/01 (weap) [Entry date 10/17/01]

10/16/01 — TRANSCRIPT filed for proceedings held on 7/30/01 (weap) [Entry date 10/17/01]

10/22/01 — LODGED CC 9th CCA JGM of the said Dist Crt hereby is dism. (FWD TO CRD) (01-56423) (ghap) [Entry date 10/26/01]

10/23/01 148 CERTIFIED COPY of Appellate Court Order: 01-56423 that the appeal is DISMISSED. (pbap) [Entry date 10/23/01]

10/23/01 149 MANDATE from Circuit Court of Appeals dismissing appeal is hereby filed and spread upon the minutes of this District Crt. (pbap) [Entry date 10/23/01]

5/8/02 151 CLERK'S record on appeal transmitted to Circuit [135-1] vols: 3 transcripts: 2, (Not included: Docket Nos. 62, 63, 68, 119, 123 - 125) (01-56436) (pjap) [Entry date 05/08/02]

6/4/02 152 RECORD on appeal returned from U.S. Court of Appeals re appeal [135-1] vols: 3, transcripts: 2. (dl) [Entry date 07/02/02]

8/20/02 153 CLERK'S record on appeal transmitted to Circuit [135-1] vols: 3 transcripts: 2 (01-56436) (pjap) [Entry date 08/20/02]

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8/20/02 154 CERTIFICATE of Record Transmitted to USCA (01-56436) (cc: all parties) (pjap) [Entry date 08/20/02]

8/15/03 155 ORDER FROM USCA Appellant's motion to stay mandate granted until 10/31/03, to permit Appellant to file petition for certiorari with United States Supreme Court. If before that date petition for certiorari is filed, this stay shall remain in effect until final disposition by Supreme Court. (01-56436) (wdc) [Entry date 08/18/03]

APPENDIX C — FOURTH AMENDED COMPLAINT FOR DEPRIVATION OF CIVIL RIGHTS [DEMAND FOR JURY TRIAL] DATED JUNE 17, 2000

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO. CV-95-01192-CBM (BOR)

GARRISON S. JOHNSON, an individual,

Plaintiff,

v.

STATE OF CALIFORNIA; JAMES H. GOMEZ, an individual; JAMES ROWLAND, an individual; and DOES 1 through 20, inclusive,

Defendants.

FOURTH AMENDED COMPLAINT FOR DEPRIVATION OF CIVIL RIGHTS

[DEMAND FOR JURY TRIAL]

INTRODUCTION

1. This case arises from the invidious discrimination by the State of California Department of Corrections, and its current and former Directors, James H. Gomez and James Rowland, in formulating and implementing a policy and

practice of housing prison inmates based solely on their race. The race-based discriminatory housing policy has escalated racial tensions in the prison population, fostered violence and distrust among the prison inmates, and created conditions which have subjected plaintiff to duress, oppression, and other cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. The discriminatory policy has also deprived plaintiff of the equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution. Plaintiff seeks damages for the deprivation of his constitutional rights and injunctive relief to remedy the discriminatory practices identified herein.

PARTIES

2. Plaintiff Garrison S. Johnson ("Mr. Johnson") is a prisoner in the custody of the California Department of Corrections, inmate #D59672. Mr. Johnson has been incarcerated in the State of California since 1987.

3. The State of California is a sovereign state within the United States and has the capacity to sue and be sued. The California Department of Corrections ("CDC") is an agency of the State of California.

4. Defendant James Rowland ("Mr. Rowland") was, from 1987 to 1991, the Director of the California Department of Corrections. Plaintiff is informed and believes, and based thereon alleges, that Mr. Gomez' responsibilities included the formulation and implementation of CDC policy, as well as the oversight of the operation and safety of all CDC facilities.

5. Defendant James H. Gomez ("Mr. Gomez") is, and has been since 1991, the Director of the California Department of Corrections. Plaintiff is informed and believes, and based thereon alleges, that Mr. Rowland's responsibilities include the formulation and implementation of CDC policy, as well as the oversight of the operation and safety of all CDC facilities.

6. Defendants sued herein as DOES 1-20 are unknown to Plaintiff and therefore are sued by their fictitious names. Plaintiff is informed and believes, and based thereon alleges, that each of the fictitiously named Defendants is responsible in some manner for the acts, errors and omissions alleged herein. Plaintiff will amend this Complaint to supply Defendants' actual names when the same are ascertained by Plaintiff.

JURISDICTION

7. This action arises under the Eighth and Fourteenth Amendments to the Constitution of the United States and is brought pursuant to the Civil Rights Act, 42 U.S.C. § 1983. Jurisdiction is based upon 28 U.S.C. §§ 1331 and 1343.

8. The claims alleged herein arose in the County of Los Angeles, State of California. Therefore, venue is proper in the Central District of California pursuant to 28 U.S.C. § 1391.

Appendix C

FACTS COMMON TO ALL CLAIMS FOR RELIEF

9. Plaintiff is housed in a two-man cell at the California State Prison in the Antelope Valley. Since 1987, plaintiff has been housed at three California prison facilities: Folsom (1987-1992), Calipatria (1992-1994) and Lancaster-Antelope Valley (1994 to present). At each California prison facility where plaintiff has been housed, including the Antelope Valley facility, plaintiff has been segregated by race in cell assignment.

10. Plaintiff is informed and believes, and based thereon alleges, that the CDC has instituted a policy and practice of housing inmates based exclusively on the race and ethnicity of the prisoner, rather than based on the first available cell. Thus, African American prisoners are only housed with other African-American prisoners, Latino prisoners are only housed with other Latino prisoners, Caucasian prisoners are only housed with other Caucasian prisoners, and all "Other" prisoners are housed together. This discriminatory policy and practice treats prisoners from different racial and ethnic groups unequally without any rational relation to a permissible purpose and fosters enmity and distrust among them.

11. The discriminatory policy of housing inmates according to their race and ethnicity is evidenced by, among other things, the prison guards' refusals to integrate the cells and statements by guards and prison officials to plaintiff such as "You can't be placed in that cell. It's a white cell."

Appendix C

12. Racial segregation has reinforced division along gang lines and created an environment of fear, racism, and violence. The result of the policy and practice was, and is, foreseeable to defendants, and those foreseeable consequences have manifested themselves through violent outbreaks and riots at the California prisons. The same invariable consequences have been repeated over and over again since this policy has been instituted: violence, rioting, and racism. Defendants have acted recklessly and with deliberate indifference by ignoring the probable and foreseeable consequences of racial segregation, and in continuing to segregate prisoners with knowledge of the invariable result.

13. Plaintiff is informed and believes, and based thereon alleges, that other prison systems in the United States have been available to the CDC as a model for integrated prisons, but defendants have recklessly ignored these other models, in favor of a flawed policy of racial segregation.

14. Plaintiff is informed and believes, and based thereon alleges, that Mr. Gomez and Mr. Rowland are aware of the deleterious effects of segregation, and continue to perpetuate the policy because the racial tension created enables all prison staff members to collect the higher wages allowed during times of racial unrest.

15. Plaintiff is further informed and believes, and based thereon alleges, that the racial segregation practice perpetuates divisiveness among the inmates, which prevents them from uniting to present grievances against the prison. Plaintiff is informed and believes, and based thereon alleges,

that the CDC continues to implement the practice of racial segregation so that it will not have to address prisoner grievances which might otherwise be raised.

FIRST CLAIM FOR RELIEF

(For Eighth Amendment Cruel and Unusual Punishment Violation Against All Defendants)

16. Plaintiff hereby incorporates by references paragraphs 1 through 15, inclusive, as though fully set forth herein.

17. Plaintiff has been deprived of the minimal civilized measures of life's necessities because of the extraordinary duress, institutional violence, and emotional distress he has suffered, and continues to suffer, as a consequence of the policy and practice of racial segregation.

18. Plaintiff has been stripped of any sense of bodily security because of the threat of physical violence from other racially prejudiced prisoners harboring violent intent, and because of the threat of physical force from prison officials attempting to quash prisoner fighting and rioting. The concomitant emotional distress caused by this ceaseless threat of physical violence is so severe that plaintiff regularly obtains counseling from a prison psychologist.

19. Plaintiff is informed and believes, and based thereon alleges, the defendants have acted with recklessness and deliberate indifference toward plaintiff's health, safety and needs. The prison officials have allowed this policy of

segregation to continue in the face of the increasing racial tension and violence caused by the policy and practice of racial segregation, with an awareness that such violence jeopardizes the prisoners' health and safety.

20. Plaintiff has suffered severe humiliation, depression, and emotional distress by reason of the deprivation of his civil rights in an amount subject to proof at trial, but estimated to be in excess of $10,000.

SECOND CLAIM FOR RELIEF

(For Fourteenth Amendment Equal Protection Violation Against All Defendants)

21. Plaintiff hereby incorporates by reference paragraphs 1 through 15, inclusive, and paragraphs 17 through 20, inclusive, as though fully set forth herein.

22. Defendants have subjected plaintiff to racial discrimination, by employing a policy and practice of segregating prisoners in cells on the basis of race.

23. The racial segregation policy is not reasonably related to the legitimate penological interests of the CDC.

24. The policy and practice of racial segregation creates and fosters racial hostility and tension among the prisoners by ensuring that they remain divided, on a physical and psychological basis. These divisions inevitably create the stereotyping that leads to prejudiced attitudes and beliefs, and violence.

Appendix C

25. The climate of increased racial animosity has directly led to a sharp increase in the amount of racial violence perpetrated upon prisoners by other prisoners in the last decade. The policy and practice of racial segregation is therefore flawed and not rationally related to the legitimate penological interests of the CDC because it creates a situation where the occurrence of violence among prisoners is significantly heightened, not restrained. The pitting of racial groups against each other also develops the need for another layer of violence, because of the physical force that must be exerted by prison officials against prisoners to quell such physical altercations. All of the foregoing has resulted in a deprivation of plaintiff's civil rights.

26. Defendants have instituted the policy and practice of racial segregation out of malice and reckless indifference to the consequences of segregation.

27. Plaintiff has suffered damages by reason of the CDC policy of racial discrimination, including but not limited to, humiliation, fear, depression, and emotional distress. Plaintiff's damages are subject to proof at trial, but estimated to be in excess of $10,000.

THIRD CLAIM FOR RELIEF

(For § 1985(3) Conspiracy to Deprive a Person of the Equal Protection of the Laws)

28. Plaintiff hereby incorporates by reference each and every allegation contained in paragraphs 1 through 15, paragraphs 17 through 20, inclusive, and paragraphs 22 through 27, inclusive, as though fully set forth therein.

Appendix C

29. Plaintiff is informed and believes, and based thereon alleges, that defendants conspired between and among themselves to deprive plaintiff of the equal protection of the laws. Defendants have acted in concert with each other, and other unknown co-conspirators, to perpetrate a policy of segregation by race, although that policy is not related to legitimate penological purposes, and harms the physical and psychological safety of the prisoners, including Mr. Johnson.

30. Defendants acted in furtherance of the conspiracy to deprive plaintiff of his constitutional rights in order to obtain higher compensation and overtime, which is paid to prison staffs during times of racial crises.

31. Plaintiff has suffered damages as a result of the deprivation of his civil rights and the conspiracy engaged in by defendants in an amount subject to proof at trial, but estimated to be in excess of $10,000.

WHEREFORE, Plaintiff prays for relief as follows:

1. For declaratory relief that the policy and practice of racial segregation by the CDC violates the Eighth and Fourteenth Amendments to the Constitution of the United States;

2. For compensatory damages for deprivation of plaintiff's constitutional rights in an amount subject to proof at trial, but estimated to be in excess of $10,000;

3. For injunctive relief directing the CDC to cease its policy and practice of racial segregation;

Appendix C

4. For punitive damages;

5. For attorney's fees and costs;

6. For such other and further relief as the Court deems just and proper.

DATED: June 30, 2000

PROSKAUER ROSE LLP
BERT H. DEIXLER
KENNETH S. INGBER

By: s/ Kenneth S. Ingber
KENNETH S. INGBER

Attorneys for Plaintiff
GARRISON S. JOHNSON

Appendix C

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a trial by jury.

DATED: June 30, 2000

PROSKAUER ROSE LLP
BERT H. DEIXLER
KENNETH S. INGBER

By: s/ Kenneth S. Ingber
KENNETH S. INGBER

Attorneys for Plaintiff
GARRISON S. JOHNSON

APPENDIX D — DEFENDANTS GOMEZ AND ROWLANDS' ANSWER TO THE COMPLAINT AND DEMAND FOR A TRIAL BY JURY DATED AUGUST 2, 2000

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NO.: CV-95-01192-CBM (BQR)

GARRISON JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA[1], et al.,

Defendants.

DEFENDANTS GOMEZ AND ROWLANDS' ANSWER TO THE COMPLAINT AND DEMAND FOR A TRIAL BY JURY

In answer to the Fourth Amended Complaint, Defendants J. Gomez and J. Rowland hereby deny, admit and allege as follows:

Introduction.

1. In answer to paragraph 1, entitled "Introduction," Defendants deny the allegations.

1. Although named in the complaint as a Defendant, to counsel's knowledge, Defendant State of California has not been served with a summons or complaint.

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Parties.

2. In answer to paragraph 2, under the section entitled "Parties," Defendants admit the allegations of said paragraph.

3. In answer to paragraph 3, Defendants admit California is a state within the United States and admit the California Department of Corrections ("CDC") is an agency of the State of California. Except as expressly admitted, Defendants deny all other allegations for lack of sufficient information and belief with which to answer.

4. In answer to paragraphs 4-6, Defendants admit Defendant James Rowland is a former Director the California Department of Corrections ("CDC"), admit Mr. Rowland's and Mr. Gomez' duties included the formulation and implementation of CDC policy, deny James Gomez is the current Director of the CDC and allege Mr. Gomez is a former Director of the CDC. Except as expressly admitted herein, Defendants deny all other allegations for lack of sufficient information and belief with which to answer.

Jurisdiction.

5. In answer to paragraphs 7-8, under section entitled "Jurisdiction," Defendants admit this Court has jurisdiction over claims brought pursuant to 42 U.S.C. section 1983. Except as expressly admitted, Defendants deny all other allegations for lack of sufficient information and belief with which to answer.

Appendix D

Facts Common to All Claims for Relief.

6. In answer to paragraph 9, Defendants admit Plaintiff is incarcerated at the California State Prison located in Lancaster and admit Plaintiff has been previously housed at prisons located in Folsom and Calipatria. Except as expressly admitted, Defendants deny all other allegations for lack of sufficient information and belief with which to answer.

7. In answer to paragraph 10, Defendants deny Defendants have a "discriminatory policy and practice that treats prisoners from different racial and ethnic groups unequally without any rational relation to a permissible purpose and fosters enmity and distrust among them." Defendants deny all other allegations for lack of sufficient information and belief with which to answer.

8. In answer to paragraph 11, Defendants deny there is a discriminatory policy of housing inmates. Defendants deny all other allegations for lack of sufficient information and belief with which to answer.

9. In answer to paragraph 12, Defendants deny the allegations.

10. In answer to paragraph 13, Defendants deny they have "recklessly ignored" other prison systems which "have been available to CDC as a model for integrated prisons." Defendants deny the remaining allegations for lack of sufficient information and belief with which to answer.

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11. In answer to paragraph 14, Defendants deny the allegations.

12. In answer to paragraph 15, Defendants deny that the CDC "continues to implement the practice of racial segregation so that it will not have to address prisoner grievances which might otherwise be raised." Defendants deny the remaining allegations for lack of sufficient information and belief with which to answer.

First Claim for Relief.

13. In answer to paragraph 16, Defendants allege that they incorporate by reference the preceding paragraphs as if set forth here in full.

14. In answer to paragraphs 17 -19, Defendants deny the allegations.

15. In answer to paragraph 20, Defendants deny Plaintiff's civil rights have been violated by Defendants. Defendants deny the remaining allegations for lack of sufficient information and belief with which to answer.

Second Claim for Relief.

16. In answer to paragraph 21, Defendants allege that they incorporate by reference the preceding paragraphs as if set forth here in full.

17. In answer to paragraph 22, Defendants deny the allegations.

18. In answer to paragraphs 23-24, Defendants deny there is a "racial segregation policy." Defendants deny the remaining allegations for lack of sufficient information and belief with which to answer.

19. In answer to paragraph 25, Defendants deny there is a "policy and practice of racial segregation," deny there is a "pitting of racial groups against each other" and deny any Defendant deprived Plaintiff of his civil rights. Defendants deny the remaining allegations for lack of sufficient information and belief with which to answer.

20. In answer to paragraph 26, Defendants deny the allegations.

21. In answer to paragraph 27, Defendants deny there is a "CDC policy of racial segregation." Defendants further deny Plaintiff is entitled to damages from any Defendant.

Third Claim for Relief.

22. In answer to paragraph 28, Defendants allege that they incorporate by reference the preceding paragraphs as if set forth here in full.

23. In answer to paragraphs 29-31, Defendants deny the allegations.

24. In answer to Plaintiffs prayer, including paragraphs 1-6, Defendants deny Plaintiff is entitled to the declaratory relief sought, deny Plaintiff is entitled to compensatory damages, deny Plaintiff is entitled to the injunctive relief

requested, deny Plaintiff is entitled to the recovery of punitive damages, deny Plaintiff is entitled to attorneys' fees and costs and specifically deny that Plaintiff is entitled to any relief whatsoever.

25. Except as expressly admitted herein, Defendants deny each and every allegation in the Fourth Amended Complaint pending investigation as to the truth or falsity of those allegations and the filing of further pleadings in this matter.

AFFIRMATIVE DEFENSES

1. Because the Amended Complaint is couched in conclusionary terms, Defendants cannot anticipate fully all affirmative defenses that may be applicable to this matter. Accordingly, the right to assert additional affirmative defenses, if and to the extent such affirmative defenses are applicable, is hereby reserved.

2. The Court lacks jurisdiction over some or all of Plaintiff's claims.

3. Plaintiff has failed to state a claim upon which relief can be granted.

4. Defendants are entitled to immunity, including qualified immunity.

5. Plaintiff's claims are barred, limited or controlled by the Prison Litigation Reform Act.

6. Plaintiff is estopped from claiming the damages requested.

7. Some or all of the Fourth Amended Complaint is barred by the applicable statute of limitations.

8. Defendants assert that Plaintiff has failed to pay the full amount of a filing fee or a partial payment of court fees as required by law.

9. Defendants assert that they are not liable to Plaintiff for any injury or damages, if there were any, caused by an exercise of discretion.

WHEREFORE, Defendants make demand pursuant to Rule 38 of the Federal Rules of Civil Procedure that the above-entitled matter be tried by and before a jury to the extent provided by law and pray for judgment as follows:

1. That judgment be rendered in favor of Defendants and against Plaintiff;

2. That Plaintiff takes nothing by this action;

3. That Defendants be awarded costs of suit and attorney's fees; and

4. That Defendants be awarded such other relief as this Court deems proper.

DATED: August 1, 2000

Respectfully submitted,

BILL LOCKYER
Attorney General

DAVID P. DRULINER
Chief Assistant Attorney General

PAUL D. GIFFORD
Senior Assistant Attorney General

DANETTE VALDEZ
Supervising Deputy Attorney General

s/ Sara E. Turner
SARA E. TURNER
Deputy Attorney General
Attorneys for Defendants
Gomez and Rowland

APPENDIX E — DEPOSITION OF GARRISON S. JOHNSON DATED OCTOBER 5, 2000

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV-95-01192
CBM (BOR)

GARRISON S. JOHNSON, an individual,

Plaintiff,

vs.

STATE OF CALIFORNIA; JAMES H. GOMEZ, an individual; JAMES ROWLAND, an individual; and DOES 1 through 20, inclusive,

Defendants.

DEPOSITION OF
GARRISON S. JOHNSON
LANCASTER, CALIFORNIA
OCTOBER 5, 2000

Deposition of GARRISON S. JOHNSON, taken on behalf of Defendants, at 44750 60th Street West, Lancaster, California, commencing at 10:35 a.m., Thursday, October 5, 2000, before Marchelle Hartwig, CSR No. 9347.

Appendix E

[commencing at page 5] GARRISON S. JOHNSON, having been first duly sworn, was examined and testified as follows:

MS. TURNER: For the record, we are here at Lancaster State Prison in Los Angeles County, California, and this is the deposition of Garrison S. Johnson. We are here regarding the case of Garrison S. Johnson versus the State of California, et al. Court No. 95-01192.

EXAMINATION

BY MS. TURNER:

Q Would you please state and spell your full name.

A Garrison Stuwart Johnson, G-a-r-r-i-s-o-n, S-t-u-w-a-r-t, J-o-h-n-s-o-n.

MS. TURNER: For the record present here today is myself, Sara Turner, deputy attorney general for the State of California on behalf of the Defendants Gomez and Rowland; the Plaintiff, Mr. Johnson; his attorney, Mr. Hilger; the court reporter, Ms. Hartwig, and Ms. Cruz from the litigation office at Lancaster, and Officer Hines.

Q Mr. Johnson, a deposition is similar to [6] testimony in court in that you are under oath. You understand you've been sworn in?

A Yes.

Q During this deposition you must reply truthfully and fully to the questions that you are asked. Your attorney can make objections but you still have to answer the questions generally unless your attorney tells you not to answer. Okay?

A Okay.

Q It's not my intent to ask you any trick questions. If you don't understand a question, please let me know and I will repeat it or I'll clarify it for you. In other words, you not required to answer a question you don't understand. So if you do answer a question, we are going to assume that you understood it. Okay?

A Yes.

Q This is important because if for some reason later on the question is used at trial, then we are making it clear for the record now that it's your responsibility to let us know if you don't understand it. Okay? Do you understand these procedures?

A Yes, I do.

Q You are not required to speculate or guess at matters which you have no personal knowledge about; [7] however, I am entitled to your best efforts at making estimates regarding times, distance or matters of which you might have personal knowledge. Okay?

A Okay.

Q You are doing fine giving good verbal responses, but I do want to remind you that the court reporter cannot record a shrug or an "uh-huh" or "huh-uh," so you have to use verbal responses. Okay?

A Okay.

Q Once the deposition is transcribed, we will provide a copy to your attorney and you will have an opportunity to review it and make corrections. However, we do have the right to comment on any corrections or changes that you would make to that deposition at trial, although you are entitled to make them. Do you understand that?

A Yes, I do.

Q You do understand that the testimony used today could be used at trial as direct evidence or to impeach or contradict something you may say at trial?

A Yes.

Q Do you have any questions regarding the procedure that I can answer for you?

A No, ma'am.

Q Now, I'm going to ask some questions about [8] your identity and competence, if I could. Have you ever used any other name?

A Yes. One time I used the name of Bo.

Q Spell that, please.

A B-o.

Q Do you have any aliases or is that an alias would you say?

A That's an alias.

Q Do you have any nicknames which you are known by or is that one that you —

A That's the one.

Q How about by family and friends? Do they know you by a nickname?

A Gary.

Q What is your prison number?

A D59672.

Q Your date of birth?

A 10/30/64.

Q Is there any reason that you know of why you cannot give your deposition today?

A None at all.

Q Are you sick or taking any medication?

A No.

Q Can you describe how you prepared for this deposition? What documents did you review?

[9] A I didn't review any documents.

Q Did you speak with any prison staff members in preparation for this deposition?

A No, I haven't.

Q Any inmates?

A No.

Q Anyone else? I'm not talking about your attorney.

A No, I haven't.

Q Do you keep a diary or journal about all the things that have happened to you?

A Somewhat.

Q Are any entries into your journal related to this lawsuit or the allegations in your complaint?

A I think I might have got one or two statements in there.

Appendix E

Q What would those pertain to if you can recall?

A I can't recall.

Q Would they be current or would they be of years back or —

A I believe it's current.

Q Have you had your deposition taken before?

A Yes, I have.

Q In what cases?

A I don't recall the cases.

[10] Q How many times have you had your deposition taken?

A I believe maybe once or twice. I'm not sure.

Q Were these cases against the California Department Of Corrections in some manner?

A Yes, they were.

Q What are the allegations of one of those complaints if you can remember one of those?

A I think one was excessive force.

Appendix E

Q What district is that pending in?

A It was in the southern.

Q Southern District of California. Who were the defendants?

A I think it was one defendant, a sergeant named Fork.

Q Like a spoon and a fork type Fork?

A Yes.

Q What was the result of that case? Has there been any final result if there has been?

A Yeah. I lost that case.

Q What would be the case number if you know? If not, what is the year that it was lodged?

A I don't know the number. The year was '95.

Q 1995. What institution were you pertaining to?

[11] A Calipatria.

Q Are you set to go to trial on any other case?

A No, I'm not.

Appendix E

Q Now, the second deposition, would that have been for another case if you recall?

A It would have been for another case.

Q Do you recall what case that was?

A I believe it was — I don't remember the title of the case.

Q Do you remember the defendants? Was it a CDC case, a California Department Of Corrections case?

A Yes, it was.

Q Do you recall who the defendants are?

A I remember one name.

Q What was that?

A Lieutenant Beltran.

Q Lieutenant Beltran. What institution?

A This one here.

Q So what district would it be in? Would it be in superior court or in —

A Central.

Appendix E

Q Central District. What are the allegations of the complaint?

A I don't recall.

Q What's been the final result of that case?

[12] A It was a summary dismissal.

Q Summary dismissal?

A Right.

Q Your case was dismissed; is that correct?

A Yes.

Q Do you have any other civil suits not pertaining to the California Department Of Corrections pending?

A I believe — yeah, I do have one.

Q What's that? Who are the defendants in that?

A Brown & Williamson.

Q Is that two people?

A It's a corporation, tobacco.

Appendix E

Q A tobacco corporation. Brown & Williamson. What do you allege in that case?

A Secondhand smoke case.

Q Have you prevailed in that case?

A It's on appeal.

Q What do you allege? That there is secondhand smoke?

A I'm subjected to secondhand smoke.

Q Is that outside of prison then?

A No. While I am in prison.

Q You are on appeal on that case. So did you lose in the district court then?

[13] A Yes, I did.

Q How about criminal proceedings? Have you ever testified in criminal proceedings?

A Yes, I have.

Q Did you testify in your own?

A Yes.

Appendix E

Q And in others; is that correct?

A Yes.

Q How many criminal proceedings have you testified in or been deposed in?

A I believe two.

Q What were the charges in your case?

A The case I'm in here now for is robbery, murder. And the other one was, I believe, receiving stolen property.

Q You testified in those two cases?

A Yes.

Q Were they both against you then?

A Yes, they were.

Q You were the defendant?

A Yes.

Q So you haven't testified in anybody else's proceedings as a witness?

A No.

Appendix E

Q Have you been deposed in administrative [14] proceedings?

A I'm not clear.

Q With the Department of Motor Vehicles or something, or Workers' Compensation? Any of those?

A No, I haven't.

Q I'm going to go ahead and kind of go into some personal data. Could you tell me your social security number, please?

A I don't know it by heart.

Q Your marital status?

A None.

Q Are you single?

A Yes.

Q Children and ages if you have any?

A One. It's a boy, age 14.

Q 14 years old. Are you presently working in prison?

A Well, yeah, I have a job. They got me assigned to yard crew.

Appendix E

Q You are in the yard crew?

A Yeah.

Q Are you just taking the day off today because of this?

A Because of this.

Q Do you have a trust account balance?

[15] A No, I don't.

Q Do you get paid for the yard crew work?

A No. There is no pay.

Q Do you receive any money from the outside?

A Yeah, family support.

Q Family sends you money then?

A Yes.

Q Do you have another source of income from the outside? Bank accounts? Real estate? Anything like that?

A No, I don't.

Q Let me ask you some questions about your criminal record. Did you mention your commitment offenses were — I thought you were talking about the present case. Was it robbery and murder?

A Murder.

Appendix E

Q Any other charges involved in that?

A I think there was a gun allegation.

Q Is that it?

A Yeah, I believe that's it.

Q How many murder charges were there?

A One.

Q How many robbery charges?

A Five.

Q What sentence are you serving?

[16] A 25 to life sentence.

Q 25 to life. The stolen property, is that a previous sentence or has that been since prison?

A That's previous.

Q Previous to that. Did you complete your sentence on that one then?

A Yeah.

Q Do you know your MEPD, minimum eligible patrol date, if I could?

Appendix E

A I think it's 2012, something like that.

Q 2012. What other convictions have you had besides the receiving stolen property? Was that a conviction?

A Yeah. I don't recall. My whole history is pretty extensive.

Q Have you ever had parole violated?

A No.

Q Have you been in prisons anywhere else in CDC?

A Yes.

Q What other prisons?

A Folsom, Calipatria, and CMC, I believe, in Lancaster.

Q Did you have a reception center that you went to? Do you recall that?

A Yeah. That's Chino.

[17] Q Local jails?

A L.A. County jail.

Q Always the same then?

A Yeah.

Q And the youth authorities; is that correct?

A I've never been in a youth authority.

Q Never been in a youth authority institution; is that correct?

A That's correct.

Q So when were you first incarcerated on your present sentence then?

A In '97.

Q Then you were housed in CIM for a reception period; is that correct?

A Yes.

Q Then did you go to Folsom after that?

A Yes, I did.

Q Then after Folsom where did you go?

A To Calipatria.

Q Did you say in your present sentence it was '97 or did you say '87?

A I made a mistake. I meant '86.

Q '86, okay. Why did you transfer from Folsom?

A I think it was a voluntary thing. They asked the inmates did they want to go to Calipatria. It was [18] just opening up.

Q Do you remember what year that was then?

A Between '92, '91. I am not sure.

Q Then after Calipatria where did you go?

A I went to CMC for like three months.

Q Why did you go to CMC?

A For a psychological evaluation.

Q You completed the evaluation?

A Yes.

Q Do you know what category that might have been?

A I believe they called it a J.

Q Then after you left CMC, where did you transfer to?

A To here.

Appendix E

Q Why did you come to Lancaster? Do you know?

A I don't know.

Q Did you request Lancaster?

A No, I didn't.

Q I'm going to kind of move into your complaint here. Do you recall the incidents that form the basis of your complaint?

A Yes, I believe I do.

Q Do you know the name of your cell mate at this time?

[19] A I know his last name as Stubbs.

Q Mr. Stubbs. Do you have a CDC number by chance?

A I sure don't.

Q Do you recall previous cell mates before him? Do you recall their names and information about them?

A No. I might can go back to maybe two.

Q Two cell mates?

A Yeah.

Appendix E

Q How long have you been in the cell with Mr. Stubbs?

A I just recently moved in with him, so maybe a couple months.

Q Who was your cell mate before Mr. Stubbs was?

A It was a guy by the name of Tyrone Jackson.

Q Did Mr. Jackson transfer out or —

A No. I moved from his cell to another cell, or the cell that he was in to another cell.

Q What was the reason for the move?

A Incompatability.

Q You're more compatible with Mr. Stubbs or you were not compatible with Mr. Jackson?

A Both.

Q Did you know Mr. Jackson before that?

A Yes, I did.

[20] Q Did you think you were compatible with him?

A Yes, I did.

Appendix E

Q Sometimes you find you are not, huh?

A Yeah.

Q Close quarters; is that correct?

A That's correct.

Q You made a claim of invidious discrimination by two of the former directors of the California Department Of Corrections; is that correct?

A That's correct.

Q Do you know what invidious means? Do you know how to describe that word?

A I am not clear.

Q Would you describe it as malicious at all?

A Yeah, that's the definition.

Q Is it your claim that they intentionally discriminated against you?

A Yes.

Q Now, first of all, did you ever have any contact with Mr. Rowland? Did you ever have any personal contact with Mr. Rowland?

A No, I haven't.

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Q I'm sorry. I asked the question the same time you were answering that. I apologize. My mistake.

A I haven't had any personal contact with [21] Mr. Rowland.

Q You've never met him, then; is that correct?

A That's correct.

Q Did you ever have any personal contact with Mr. Gomez?

A No, I haven't.

Q Would you know those two gentlemen if you saw them here today?

A I don't believe I would.

Q I think your complaint, and correct me if I'm wrong, is that you said that Mr. Rowland and Mr. Gomez implemented a policy and practice of housing inmates based solely on their race?

A Yes, I did.

Q Do you have a copy of that policy that you are referring to?

A No.

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Q Have you ever seen a policy that would say that?

A No.

Q Would it surprise you — did you read my interrogatory responses that I have submitted on behalf of the defendants? Did you have a chance to read those?

A No, I haven't.

[22] Q I'm not aware of any policy. I mean, I have never located one. And I am just wondering if you had — you indicated you've never seen one?

A So are you saying there is no policy?

Q Well, I'm not saying that. I don't know. But so far we've never been able to come up with a policy.

A I haven't read one.

Q You have not. Okay. I thought maybe you might have something. Have you read Title 15?

A Yes, I have.

Q So it's certainly not the source of your policy; correct?

A That's correct.

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Q Let me ask you about your education. Did you graduate from high school?

A No.

Q Have you been getting some education while you've been here in prison since '86?

A Yep.

Q What level have you achieved would you say towards graduation from high school?

A Well, I attempted to take my GED one time. I got up to where I registered in 10th grade.

Q Approximately 10th grade then?

A Yeah.

[23] Q Are you continuing with your education or did you abandon that?

A I'm not. I'm on the yard crew now.

Q So you are working instead right now?

A Yeah.

Q Do you feel comfortable with reading?

A Yeah, I like to read.

Q So you know how to read well would you say?

A Yeah.

Q Maybe I know the answer to this question, but I'm going to ask. Have you had any criminal justice courses outside of prison?

A No.

Q So you have no background in administration of justice or prison administration?

A No.

Q You've never seen a policy, so there is — one has never been found, but if you do have a policy would you be sure that you make sure that I get a copy of that because you didn't bring one?

A Yeah, I would.

Q I'm making you laugh obviously. A little bit of levity here.

How many races are there would you say? Have you ever given some thought to that question?

[24] A Probably four to five different races in the system.

Q Four to five different races?

A Uh-huh.

Q What race are you a member of?

A The African-American.

Q The African-American race. Now, you mentioned a practice of housing inmates based solely on their race. Would you say that is one of your complaints?

A Yes, I would.

Q Can you tell me what that practice is?

A Yes. That practice is simply how inmates are housed based on the color of their skin. They put you in cells — if you are black, they look for a cell that has a black person. If you are white, they look for a cell that has a white person. They match you up based on your color.

Q From among those four to five races?

A Yeah. If you're Asian, they are going to look for an Asian. They classify Asians and Samoans as others, so they will look for a cell with the classification of others and they put you in there.

Q You talked about compatibility. Had you ever heard of a practice of housing people based on compatibility?

[25] A Yeah, I believe vaguely I have.

Q But it seems like that's something that you were mentioning was a reason for a recent change was compatibility?

A Yes.

Q Is your cell mate African-American?

A Yes, he is.

Q You are compatible with him?

A The one I got now, but the other African-American we wasn't compatible.

Q If you were compatible with someone of a difference race and you wanted to house with that person could you do that?

A Sure.

Q What would be — so compatibility is the key; is that correct?

A You wouldn't know that you are compatible until you first move in with a person.

Q Until you get to know them; is that right?

A Exactly.

Q When you transferred to Lancaster, for instance, is there a period of time where you are going through a reception orientation period?

A Yeah. I believe I went through orientation when I first got here.

[26] Q Was that a period of time where you could have gotten to know some other people?

A No. The orientation is simply they put you in a cell and you stay. You don't mingle amongst the general population until you get classified, go through some kind of classification committee.

Q Do you know the purpose of a classification when you are new to a prison?

A No.

Q Let me ask you a question about compatibility. For instance, if you had testified against someone, like your crime partner, if you had a crime partner in your offenses that you committed, and I believe you did; isn't that correct?

A Yes.

Q Now, say you had gone to trial and testified against that person and as a result of your testimony they ended up going to California State Prison. Okay? Now, if you were just placed in a cell with that person, could there have been a problem?

A I imagine there would be a problem.

Q Could that be — is that the purpose, that classification might be able to find out whether or not you know that person from previous history?

A I'm pretty sure that's one of the reasons for [27] classifying us.

Q What else, if you know, might be a reason for classification?

A Well, they want to see what type of jobs they want to give you or what type of program they want you to be involved with.

Q So programming, jobs. What I was describing, would that be an enemy type situation?

A Yeah.

Q Do you have any enemies in prison?

A No.

Q Do you have an enemy list?

A No.

Q Did you ever have one?

A No.

Q How about gang affiliation? Do you have a gang affiliation?

A No.

Q Did you ever have one?

A At one time.

Q Which gang?

A The Crip gang.

Q You were a member of the Crip gang?

A Yeah.

Q Would that be something that you would be [28] questioned about in classification?

A They never questioned me about that.

Q It never came up in a classification hearing?

A Not to my knowledge. I don't recall.

Q How about medical or mental health, has that ever come up in classification?

A It might have come up when I first came to the system.

Q I have a question. Would those items kind of lean towards finding someone who is compatible with you if you could match up in some of these areas, or is my question too speculative for you to be able to answer?

A Could you simplify it a little more, please.

Q Say, for instance, you go to classification. You haven't found anybody you are compatible with for having a cell mate and you go to classification and they ask you questions about your enemies and about your gang affiliation, possibly your programming or your mental and medical health, would this start to be able to find from that people who you might be compatible with in a cell?

A I don't think so.

Q You don't think that would have any — you don't think the enemy would be one?

A Well, if you have anyone listed as an enemy, [29] yes, that would be one. They would not put you in a cell with your enemy.

Q At classification would they have their paperwork in front of them to be able to look —

A Yes. They will know whether or not you have enemies.

Q So that would be one thing that they would check at that time before you were placed in a cell with someone?

A Yes.

Q What could happen if you were placed in a cell, for instance, with a person that you had put on an enemy list?

A I don't know. Probably have some type of altercation.

Q Who would you feel would be responsible for that?

MR. HILGER: Objection. Speculative. It's a strange question.

MS. TURNER: It's very speculative.

Q It would depend if you asked for that or if someone else placed that on you without your choice?

A I don't know.

Q That's fine.

That is pretty speculative. You are right.

[30] Now, once you find somebody that you are compatible with — now, you feel you are compatible with Mr. Stubbs. You talk a little bit about a violation of your constitutional rights in the area of the 8th amendment. Can you tell me what you mean by that if you know? If you don't know, I can be a little more specific in my questions if that would help you.

A Please do.

Q You said that you were deprived of the minimal civilized measures of life necessities because of invidious discrimination, policy or practice. Does that help you at all, or would you still like me to be more specific? Because my question is what do you mean by that? Can you explain to me what you mean? Do you get three meals —

A Yes. I believe that it's an 8th amendment violation for the way that the system houses inmates based on the color of their skin, it puts them at harm, and this sort of policy, procedure or practice causes one to be placed at risk physically, psychologically, et cetera.

Q Now, have you ever been deprived of the minimal civilized measures of life's necessities personally?

A Yes, I believe I have.

[31] Q Do you get three meals a day? Do you get offered three meals a day here in prison?

A Yeah. They are supposed to give you three meals a day.

Q Do you regularly get them?

A Yeah, regularly. Sometimes I might not get them.

Q What would be a situation where you would not get one?

A If you get an officer who wants to play games and don't let you out of the cell, you might lose your meal that time. That has happened to me before.

Q It's happened how many times?

A Not too often. I don't know.

Q Once?

A More than once.

Q Twice?

A More than twice.

Q Maybe more than three times?

A About five or six times.

Q For 13 years?

A Yeah.

Q Did you file a grievance about that?

A No.

Q But you could have; correct?

[32] A Yes.

Q You could have probably spoken to a sergeant?

A Yes.

Q But you chose not to?

A Yes.

Q But generally over the last 13 years you were offered your meals on a regular basis?

A Yes.

Q Do you have medical care here in the prison?

A Yes.

Q Have you ever utilized it?

A When I'm ill.

Q When you're ill?

A Yeah.

Q How about mental health care? Have you ever utilized those services?

A Yes, I have.

Q Would you have a medical chart? If I were to look for one, you would have one that's been growing over the years; is that correct?

A I don't know about growing, but I have one.

Q So if you are ill and you need medical or if you feel you need mental health care you are able to get it?

A Yes.

[33] Q How about shelter? Do you have —

A Yeah.

Q — a room?

A Room and board.

Q How about exercise opportunities?

A Yes.

Q I saw some gentlemen out on the yard.

A I have that.

Q Sanitary needs are met; is that correct? You have toilet facilities in your cell —

A Uh-huh.

Q — available to you?

A Yes, I do.

Q Do you have showers available to you?

A Yes, I do.

Q So really those are what I would describe as the minimal civilized measures of life's necessities. Can you think of any others?

A Yeah.

Q What is that?

A No, I can't think of any others.

Q You mentioned your safety. Now, have you ever been assaulted by somebody of a different race?

A No.

Q Have you ever been assaulted by somebody of [34] your own race?

A Yeah.

Q Have you been involved in mutual combat with people of your own race?

A Uh-huh.

Q Have you been involved in mutual combat with people of other races?

A No, not that I can think of.

Q So when you talk about your safety, do you feel your safety has been impacted by any of the practices here in the prison?

A Yeah.

Q Tell me about that.

A Well —

MR. HILGER: Objection. Calls for a narrative.

MS. TURNER: Well, he seems to have an instance that he wants to — makes a complaint unless he is making the complaint in a general sense.

Q Do you believe this could be the case or did it really happen to you?

A I believe that I'm at risk; that something can happen to me the way the system houses inmates, from other riots that I came across and was almost involved in, witnessed other people getting stabbed, killed [35] behind racial tension and riots.

Q So do you think there is racial tension in the prison?

A Yes. In this prison, in various other prisons.

Q Is it your contention that it's because of invidious discrimination by Mr. Gomez or Mr. Rowland?

A By the housing policies.

Q Those policies are unwritten policies; is that correct?

A I couldn't tell you that.

Q You don't know. Can you give me any examples, if you have any, of when you have been almost subject to being a victim of the policies?

A Well, I was incarcerated at Calipatria before the major riot broke out there with Mexican and black inmates. I was transferred right before that to CMC. I just escaped that. If I would have stayed there, I would have been involved in that because you have four facilities there and each facility went on a major riot and a lot of people got hurt and injured just based on your skin color. I'm black, and if I was there I would have been hurt.

Q But you don't know that for sure?

A Well, I went to see doctors, psychiatrists.

[36] My psychiatrist thought some of the issues were based on the fear that I have been put under, and through the history of my incarceration I fear that I might be harmed because of the housing policy.

Q This is a mental health fear that you carry?

A Mental. I feel that it's mental.

Q Who is your psychiatrist?

A I don't recall his name. As a matter of fact, he told me he can't help me.

Q When was the last time you saw him?

A I can't recall the date.

Q But essentially you were gone from Calipatria when any problems occurred?

A Essentially, but just in here you have racial riots happening here on a large scale. I was on C Yard and there was a major riot that happened there. I got transferred to A Yard just before it happened. That's my whole fear that one day it's going to catch up to me and I'm going to be there.

Q You believe this is based on a policy from Mr. Gomez or Mr. Rowland?

A I believe the directors of the Department Of Corrections are responsible for their policies in the way the institutions are being ran.

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Q But we've never located that policy that you [37] are talking about; correct?

A I don't know. I don't have access to the policy.

Q You are not referring to another policy?

MR. HILGER: Objection. Asked and answered.

BY MS. TURNER:

Q I'm going to show you this chrono here. Do you know Dr. Milan from Calipatria?

A It's been so long ago I don't know.

Q He wrote this chrono, and I'm going to show this to you. It's the middle one here that I would like you to take a look at. I'm going to read it to you.

MR. HILGER: Is this going to be marked as an exhibit?

MS. TURNER: No, I'm not going to mark it as an exhibit.

MR. HILGER: Do you have a copy?

MS. TURNER: No, I just have this one.

THE WITNESS: Okay.

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BY MS. TURNER:

Q Is that the one you were referring to from Calipatria prior to going to CMC, the fear that you had?

A Yeah, I believe some of it is.

[38] Q Let me take a look at that. Let me read that. "Inmate Johnson" with your CDC "is a 29-year-old black male who was treated by a psychiatrist as a child with Ritalin. For the past year he has been very paranoid regarding his relationship with white officers. He also hears voices and sees things in his cell, but he cannot recognize them. He has used cocaine heavily. Currently he is on antipsychotic medication." The plan was recommend transfer to CMC East or CMF for evaluation, and the date of that was October 15, 1993. Is that the one you were referring to when you left Calipatria?

A Well, that's kind of vague. He did a whole report and I told him that while I was in Calipatria that the officers there was basically harassing blacks, causing tension, and I was having a lot of anxiety. I couldn't sleep. And on that basis he recommended I go up to CMC, but that was basically the problem that I had in Calipatria.

Q The hearing voices and seeing things in the cell, are those related to the relationships with white officers at all?

A No. That don't have nothing to do with the white officers.

Q So that was unrelated to that?

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[39] A Yeah.

Q Let me get back to my train of thought here. Did you ever request to cell with somebody of a different race who you were compatible with?

A I don't believe I did, no.

Q Why not?

A I was never asked did I want to cell with another race or anything like that. All I know is that when I first came into the system they told me they had to find me a black cell.

Q Who is "they"?

A Whoever the officers are that do the cell assignments when you come into the system.

Q Do you know the officer's name?

A It's been so many years ago when I first came in. I couldn't tell you.

Q So this was when you first arrived at the prison?

A When I first arrived. They said any prison you go to they look for a cell for you based on your skin color.

Q But you did say you could house with anyone who you were compatible with of any race?

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MR. HILGER: Objection. Misstates his testimony. He didn't say that.

[40] BY MS. TURNER:

Q If you wanted to house with someone of a different race, you could; isn't that correct?

A I don't have no problem with housing with any color, any ethnicity, different race. No problem.

MR. HILGER: When you are asking if he could, I think he is understanding it in a general sense as to whether he would be able to get along. Not whether he would be able to within the system. I think that question is unclear.

BY MS. TURNER:

Q Okay. So within the California Department Of Corrections, if you wanted to house with somebody of a different race than you are, would your request be granted provided both of you agreed to it?

A I don't have no idea whether it would be granted.

Q If you read the interrogatory responses they indicate that that's the system of how they seek to find compatible cell mates.

A So what you are trying to tell me is that you have to ask to be in a cell with a different race if you wanted to live with a different race; otherwise, they just put you in a cell based on the color of your skin?

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[41] Q Well, it's my understanding that the key would be finding someone you're compatible with, period.

A Well, if I'm compatible with someone of my same race. But when you come into the system they don't ask you whether or not you are compatible. What they say is I've got to find you a cell based on your race, and that's where they put you in your cell. You don't find out that you are not compatible with a person until they put you up in here and you all are not on the same wavelength, you all don't see things clearly, you're arguing, then you go tell the person that controls the cells that we can't get along, and that's what incompatibility is all about. We can't get along. Then they try to tell you to go find somebody else that you can get along with.

Q Do you think that's unreasonable?

A I don't know whether it's unreasonable or not.

MR. HILGER: That's sort of vague. When you say "that," I'm not sure what you are referring to.

BY MS. TURNER:

Q That seems to me what you are describing to be your understanding of the practice then?

A Yes.

Q Do you think that's an unreasonable practice to try to find somebody whom you are compatible with?

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[42] A It depends. If they are only going to allow you to house or be in a cell with somebody just your race — if I tell them I'm not compatible, they expect me to go find somebody else black and try to find compatibility. If I go find somebody white or Mexican or another color and you tell them that me and this guy get along and we want to cell, I don't believe they would let us cell together.

Q Now, what you are saying is you don't believe it, but you've never asked that; is that correct?

A No, I never — see, that's what I'm saying. The whole system is designed where you house you don't know you are compatible until you get in there. If they house me in a cell with different races, I would know who I can live with. I would know who I could be compatible with other races.

Q But you meet people out in the yards or you meet people through 13 years living in the same place.

A Well, if you've got a system that's been operating like this for I don't know how long, and other inmates — everything is racially segregated. You can't go to a white guy and say, "Hey, man, I want to move with you." You can't cross the races. That will start the racial tension right there. So I know that I can't go to a white guy and say, "Hey, I want to [43] move with you" because he is not going to move with me.

Q What if he wants to move with you?

A I'm saying the system creates this.

Q What if he wants to move with you?

A Well, if he wants to move with me, we have got to try to move together.

Q So it would work then; correct?

A It should work.

Q It does, doesn't it?

A No, because you don't see it nowhere. You can go right here in this institution and you won't see no black and white, no black and Hispanic. You won't see it like that.

Q How about Hispanic and white?

A I don't know about that.

Q How about white and Asian?

A I don't know about that.

Q How about Asian and Hispanic?

A I don't know about that, but you won't — the thing is if you want to be realistic about it, all the other races get along except the blacks. So when it comes to a black issue and you want to live in a cell with one of them, you won't never see nothing like that. You won't never see it.

Q Well, you know, maybe you haven't seen it, but [44] actually the goal of the Department from reading the interrogatory responses is to find someone whom you are compatible with.

A Where are they doing it at? At what institution?

Q Well, this isn't my deposition.

MR. HILGER: You didn't ask a question. You made a statement.

BY MS. TURNER:

Q You haven't read the interrogatory questions. I know you haven't read them.

MR. HILGER: He hasn't had a chance to read the responses because I got them yesterday — I got them on Tuesday. Maybe we should take 10, 20 minutes and he can read the responses before we go forward.

MS. TURNER: Well, I don't think I am going to ask any more questions about it, to be honest. I think we have pretty well clarified the issue about the policy.

Q Have you ever been in a dorm?

A No, I haven't.

Q Are you familiar with dorm housing?

A No, I'm not.

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Q Is that because of your points?

A My custody level.

[45] Q Your custody level?

A Yes.

Q What is your custody level?

A Level 4.

Q Could you live with someone who's level 1?

A No.

Q What are your points? Do you know that?

A Maybe 103, 104, something like that.

Q Did you ever mention to anybody that you wanted to live with somebody of a different race?

A As far as prison officials?

Q Yes.

A No.

Q So you just filed the lawsuit?

A Yeah, based on the practices that the system has.

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Q You never filed a grievance about that?

A No. What brought it to my attention is that I know that there was an order telling CDC to stop housing people based on the color of their skin and put them in a cell with — put them in any available cell, and I noticed the system wasn't doing that.

Q What order was that? Can you tell me?

A I don't know.

Q Did you ever read it?

[46] A Yes, I did.

Q You don't know what the order was?

A It was a federal order from the federal courts.

Q What federal court was that? Do you know?

A I don't recall. So basically I felt I didn't have a choice as to living with someone of an opposite race based on the way they also tell me when I come in here we've got to find you a black cell. We have got to find you somebody black that you can live with, so that's what I thought.

Q Who said that to you?

A Like I said, I don't recall exactly. It's just normal procedures.

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Q But it was neither Mr. Gomez nor Mr. Rowland; is that correct?

A No, it wasn't them.

Q And you've never sued anybody else, is that correct, about this issue?

A That's true.

Q The federal court order that you are referring to appears — are you alleging that it was violated?

A Exactly.

Q Did you bring that to the attention of the federal court judge that issued the order, if there was [47] such an order?

A No, I didn't.

Q Now, you said I think in your complaint, I don't remember which paragraph it is, but I can find it. You said prison guards refused to integrate cells. I'm trying to find that.

A Prison officials?

Q Actually you used the word guards, or your attorney did. It's paragraph 11. Can you tell me what prison guards they were?

A Not offhand.

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Q Did you ever file an appeal on that issue?

A No.

Q You said that other prison systems, again, I don't have the paragraph and I will find it for you. You said that other prison systems have been available as a mode for integrated prison — as a model for integrated prison, but that the defendants ignored them. Can you tell me what other prison systems you are referring to?

A Please repeat that.

Q I believe you said that other prison systems have been available — were available as a model for integrated prisons, but that the defendants ignored them. Can you tell me what other prison systems you [48] are referring to?

A Like I said earlier, I'm from back east and the prison systems back there as well as the prison systems down south they don't house you the way the State of California do. You go to prison, you don't get no privilege to be housed in the cell with your same race. Part of your punishment is, hey, we are going to put you in there whether it's a black, it's Italian, it's a Puerto Rican. They just put you in the cell. In the State of California they give you the privilege of being housed with just your race only.

Q Now, do you consider that a privilege then?

A Yes, most definitely.

Q You are getting me a little confused. Do you know any of the prison systems — have you ever been in another prison in another state?

A No, but I have family members.

Q But you can't correspond with them if they are in prison; is that correct? Or can you?

A Not through the prison you can't.

Q But you've been able to get this information from family members?

A Family members and other individuals that have been incarcerated in other states.

Q And you have a family member in the state [49] prison here; is that correct?

A No.

Q Did you ever have one in here?

A Yes, I did.

Q Could you have celled with your family member if you would have liked to?

A If my family member was black, I think I could have.

Q If you wanted to cell with him, you could?

A Yes.

Q You would be compatible with your brother; is that correct? Is it your brother?

A Yes.

Q If you wanted to, you could; is that correct?

A Yes.

Q In paragraph 18 you said that racially prejudiced prisoners harbor violent intent against you. Can you tell me what you mean by that?

A I believe we covered that too. It's all based on the color of your skin. If a racial riot was to occur between blacks and any other race, because of my skin I could be harmed. If I could just manage to change myself to another color, you know, I could save myself.

Q Did you ever file a 602 about any of those [50] issues?

A I don't recall.

Q You mentioned severe humiliation in paragraph 20. Can you explain what you mean by that?

A Well, you know, like I said, I was seeing psychiatrists behind this. I have been depressed, mostly stressed out. I can't sleep because it constantly worries me. Even just to have to sit here and go through this deposition is humiliation in itself. Based on my psychological file that you just showed

me and based on my fear for white officers as well because I believe that the officers support the racial segregation in this system.

Q You believe the — which officers?

A Basically I believe that it's the white officers that support the racial segregation of the inmates from my experience in this system.

Q Can you tell me what you mean by "supports the segregation"?

A Well, a lot of stuff that — we can take Corcoran institution. All the inmates mingle and run into each other. They explain what's happening. A lot of officers at Corcoran institution used to take Mexican and black inmates and release them to the yard together and isolate them knowing that they was going to [51] fight, and most of these officers were predominantly white officers. This is the reason why I'm saying they support this system because once you keep us housed the way you house us that they can play games with us and put us into situations where we will go at each other, but if we lived in the same cells they couldn't do that to us.

Q Have you ever been to Corcoran?

A No, I haven't.

Q Let me ask you a few more questions here.

MR. HILGER: Could we take like a five-minute recess?

MS. TURNER: Sure.

(Recess was taken.)

BY MS. TURNER:

Q You mentioned conspiracy between the defendants. Can you tell me what facts you base that conspiracy — your allegation on?

A Well, considering it's against the directors of — or former directors of CDC, conspiracy is based on that they administer or oversee the institutions, and they had knowledge or should have known that the wardens in various different institutions was practicing this type of housing procedure, and they had to agree upon it and allow it to continue.

[52] Q So you are speculating on this; is that correct?

A I'm just looking at the supervisory role.

Q You mention that there is higher compensation and overtime paid during racial crises?

A Yes.

Q You think that Mr. Gomez or Mr. Rowland prefer there to be racial crises for the reason of higher compensation?

A Well, I mentioned that to say why the problem hasn't been eradicated or they haven't followed the court order is that during a racial crisis like that the officers get higher wages doing overtime, stuff like that that would keep them over, so, you know, it's a benefit.

Q What is the overtime they would get? For doing what?

A Maintaining peace and security of the institution.

Q Wouldn't everybody just be locked down and so it would be very quiet?

A Well, if you have to go over your eight hours, you get paid for it.

Q So you think a lock down would put you over your eight hours?

[53] A If you get off at 2:00 and the riot happened at 1:00, it might take you until 4:00 or 5:00 or longer to do everything.

Q So you are just speculating about that as a possibility?

A No, experience.

Q What experience do you have in that?

A Of seeing stuff that happens where it causes officers to do overtime and get higher wages.

Q . You think that they want that to happen? They want a racial crisis?

A I'm not saying that. I'm saying that's why they haven't complied with the court order.

Q The court order, did you have any reflection as to what court order that might be?

MR. HILGER: Objection. Asked and answered.

BY MS. TURNER:

Q I thought maybe you might have been able to come up with some additional information.

MR. HILGER: Not in that room over there.

BY MS. TURNER:

Q Now, do you have any injuries that you are claiming at all?

A The injuries that I'm claiming is the stress that I'm under and the fact that I lose sleep. I would [54] like to talk to somebody about this to help me deal with the situation that I'm in. The medications that I have been placed on —

Q What medications were those?

A I believe — the only one I can remember is Haldol.

Q Did that help you?

A No.

Q You have a job in the prison; is that correct? You work on the work crew?

A Yes.

Q You are able to go to your job?

A Yes.

Q Do you like your job?

A No.

Q What job do you like?

A There is no job here I think I like.

Q You don't care for any of them; is that correct?

A (No audible response.)

Q Are you able to go to the library if you need to?

A Yes.

Q Now, when did you first start having mental health problems? You mentioned, I think, in that [55] chrono you were on Ritalin as a child. Do you recall that at all?

A Yes.

Q Did you have some mental health problems as a child?

A I was hyperactive.

Q Have you had mental health problems since then continuously or do you feel that you've had —

A Well, I haven't had no mental health problems as far as this until I came in here. The only thing I was given Ritalin for was to keep me from being hyperactive.

Q So you are saying it started when you came to prison?

A Yes.

Q Were your expectations of prison different than what they ended up being?

A I didn't have no expectations.

Q You had no expectations. Did you appeal your criminal sentence?

A Yes.

Q Did you lose that appeal or is it still ongoing?

A I lost it.

Q You are seeking punitive damages against the [56] defendants, Mr. Rowland and Mr. Gomez. Why are you seeking punitive damages, if you know?

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A Well, as I said earlier, I believe they are responsible.

Q Why do you believe they should pay you money?

A Due to the suffering that I have been subjected to for the numerous years.

Q How many 602s have you filed since you've arrived at prison? Would you know?

A A lot of them.

Q So you are comfortable with filing them if a problem occurs?

A Yes.

Q You know how to write them, in other words?

A Yes.

Q Is there any reason you elect not to file a 602 for the problems you are claiming in this complaint?

A The only thing I could recall when this issue first came up is that I know there was no possible way that they was going to allow me to live in a cell with someone else based on the way they was doing things, so there was no need.

[57] Q But you never asked; correct?

A I knew that they wouldn't do it.

Appendix E

Q But isn't it correct you never asked?

A That's the reason I never asked.

MR. HILGER: Asked and answered.

BY MS. TURNER:

Q But you really haven't answered the question.

MR. HILGER: He has answered the question. You've asked it more than once.

BY MS. TURNER:

Q You've never asked —

MR. HILGER: Asked and answered.

BY MS. TURNER:

Q — isn't that correct?

A There was no possible way.

MR. HILGER: He answered.

BY MS. TURNER:

Q So you disagree with the responses of the interrogatories; is that correct?

MR. HILGER: Objection.

MS. TURNER: He didn't read them. Okay.

Q I can't really think of any more questions that I can ask at this point. Maybe your attorney is going to ask some questions. I'm going to go ahead and conclude.

Are you going to ask any questions?

MR. HILGER: I just have one follow-up [58] question — actually a couple of questions.

EXAMINATION

BY MR. HILGER:

Q What does the word "privileged" mean to you?

A Privilege means when somebody gives you something that they can take away from you, like a gift or something.

Q Earlier you were asked whether you thought it was a privilege to be housed with people of only your race and you said yes. What did you mean by that?

A I meant that it don't matter what color you is, if you white, black, Mexican, Hispanic, you come into the system and you are confined in a cell based on your race, that's a privilege. It's saying it's all right to be segregated and continue to be segregated. If you take away that privilege, we don't have the segregation housing anymore.

Q To you is a privilege a good thing or a bad thing?

A It's a bad thing.

MR. HILGER: I guess that's it.

[59] FURTHER EXAMINATION

BY MS. TURNER:

Q I have a question on that. What privilege group are you in?

A What do you mean by that?

Q Are you in privilege group A? B? C?

A A.

Q What does privilege group A mean? What do you get as being in privilege group A?

A I think you get something like a quarterly package, and you can spend a certain amount of money in the canteen or something like that, that you can't do if you don't have a privilege group A.

Q Is that a good or bad thing to be in privilege group A?

A Well, when you put it that way, that's semantics there. I guess it would be good. In that context it would be good.

Q So you would want to be in privilege group A, correct, because you would get quarterly packages?

A Yeah.

Q And you can spend money in the canteen?

A You can have something your way or what you like, yes.

MS. TURNER: I have no more questions.

[60] MR. HILGER: So a privilege can either be a good thing or a bad thing?

THE WITNESS: Exactly.

MS. TURNER: The court reporter is going to prepare a transcript of this deposition and is going to send the original to me with a copy to your attorney, or vice versa.

MR. HILGER: Send it to me. I will send it to him for signature and get it back to you.

MS. TURNER: Could you get it back to us within 30 days? That's pretty much the time.

MR. HILGER: Assuming prison mail —

MS. TURNER: Or less if you get it faster. Prison mail is the same as any mail.

Do you wish to add anything to your deposition today?.

THE WITNESS: No, ma'am.

MS. TURNER: Then the deposition is concluded and the court reporter is relieved of her duties.

(Time noted: 11:55 a.m.)

APPENDIX F — MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY PLAINTIFF GARRISON JOHNSON FOR SUMMARY ADJUDICATION ESTABLISHING LIABILITY ON THE SECOND CLAIM FOR RELIEF (VIOLATION OF EQUAL PROTECTION) AND THE THIRD CLAIM FOR RELIEF (CONSPIRACY TO DENY CIVIL RIGHTS) DATED APRIL 9, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV 95-1192-CBM (BQR)

GARRISON JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY PLAINTIFF GARRISON JOHNSON FOR SUMMARY ADJUDICATION ESTABLISHING LIABILITY ON THE SECOND CLAIM FOR RELIEF (VIOLATION OF EQUAL PROTECTION) AND THE THIRD CLAIM FOR RELIEF (CONSPIRACY TO DENY CIVIL RIGHTS, DATED MAY 7, 2001

[Filed concurrently with Notice of Motion and Motion by Plaintiff Garrison Johnson for Summary Adjudication, Statement of Uncontroverted Facts and Conclusions of Law, and Declaration of Jeff Garcia Hilger]

Appendix F

Hon. Consuelo B. Marshall

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

[Tables of Contents and Authorities Intentionally Omitted]

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Garrison Johnson is an individual of African American decent who has been living in institutions controlled by the California Department of Corrections ("CDC") for the past sixteen years. Throughout that time, he has never been placed in a cell with anyone other than another African American. This is so because the CDC determines where a prisoner is housed upon arrival at a CDC-run institution based upon that prisoner's race or ethnic background. (That practice is referred to below as the CDC's "Initial Placement Practice.")

In 1995, Johnson filed suit against the State of California and its Department of Corrections[1] challenging the CDC's

1. The named defendants are former CDC directors James Gomez and James Rowland and current CDC director Steven Cambra. (*See* Fed. Rule of Civil Procedure 25(d)(1).) All three are being sued in their individual capacities for monetary damages. In addition, Cambra is being sued in his representative capacity for injunctive relief. Although the CDC is not a named defendant, it will be referred to as a "defendant" in this motion because its policies are in issue and because Cambra is being sued in his representative capacity as the CDC director.

practice of segregating prisoners by race or ethnicity upon their arrival at CDC-controlled institutions.

In the Complaint now before the Court, Johnson seeks damages and injunctive relief on three claims for relief: (1) cruel and unusual punishment in violation of the 8th Amendment, (2) violations of the equal protection clause of the 14th amendment, and (3) conspiracy to deprive a person of equal protection of the law under 42 U.S.C. § 1985(3). The discovery conducted in this action establishes that the CDC follows a practice of segregating prisoners by race or ethnicity upon their arrival at CDC-controlled facilities and that none of the CDC's so-called justifications for this practice can withstand judicial scrutiny. Accordingly, in this motion for Summary Adjudication, Johnson asks the Court to enter an order adjudicating that the CDC, through its past and present directors, is liable for violation of his right to equal protection and that the named defendants are personally liable on the third claim for relief for conspiracy to violate such right.

II. PROCEDURAL HISTORY AND BASIS FOR MOTION

In February 1995, Johnson, acting *pro per*, filed his original Complaint in this action. Subsequently, that Complaint was amended. In January 1998, the district court dismissed the Third Amended Complaint without leave to amend, and Johnson appealed. Thereafter, on March 21, 2000, the Ninth Circuit issued an order reversing in part the district court's dismissal. [Exhibit A to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion ("Ex. A"), 207 F.3d 650, 653.]

The Court of Appeals noted that Johnson's claims, "[a]lthough inartfully stated . . . are sufficient to state a claim for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment." [Ex. A, 655.] The Court observed that "Johnson in essence alleges that a policy of racial segregation in housing has been enforced on him and other inmates throughout the prison system for over a decade. He alleges that the wardens are aware of the deleterious effects of race-based housing, that the practice serves no legitimate penological purpose, and that the practice persists. . . ." [Ex. A, 655.] Finally, the Court held that the "district court erred in dismissing this aspect of Johnson's complaint. . . . The district court also erred in dismissing Johnson's § 1985(3) conspiracy claim with prejudice. . . . [T]he complaint here contains more than a bare allegation of conspiracy, and additional facts in support of the alleged conspiracy may develop as Johnson proceeds with discovery on his equal protection claim." [Ex. A, 655.]

When the case was remanded to the district court, the Proskauer firm agreed to represent Johnson on a pro bono basis. Thereafter, the Complaint was amended once again and discovery proceeded.

The Court of Appeals was correct in its prediction that through discovery Johnson might develop additional facts to support his claims. The testimony of the current director of the CDC, the testimony of the warden of the Lancaster prison in which Johnson currently resides, as well as the form used by CDC representatives when they first assign prisoners to cells, all confirm that during the entire time Johnson has been in its custody and continuing to this day, the CDC has

followed a practice of segregating prisoners by race or ethnicity when they arrive at CDC-controlled facilities.

III. STATEMENT OF FACTS

Plaintiff Garrison Johnson, an African American, has been incarcerated and living within institutions controlled by the CDC since 1986. [Deposition of Garrison Johnson, Exhibit B to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion ("Ex. B"), 17:10-11, 22-23, 22:17-18, 24:5-7.] During that entire sixteen year period, the CDC always has placed Johnson in cells with other African Americans. [Ex. B, 39:7 - 40:17.] Throughout that time Johnson also has observed that every person of another race or ethnicity (e.g. Caucasian, Asian, or Latino) consistently has been placed in cells with persons of that same race or ethnicity. For example, a white prisoner always will be placed with another white prisoner, and a Mexican inmate always will be placed with another Mexican inmate. [Ex. B, 43:5-13.]

Both Associate Warden Linda Schulteis, the CDC official in charge of cell assignments at the institution in which Johnson is currently housed, and Steven Cambra, the current Director of the CDC, have admitted in deposition that the CDC uses race as a primary factor in determining where new inmates will be housed. The CDC requires that if a new prisoner is going to be placed into a cell with another prisoner, then the two must be of the same race or ethnicity. [Deposition of Linda Schulteis, Exhibit C to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion ("Ex. C"), 21:9-20, 22:10-16, 39:15-21; Deposition of Steven Cambra,

Exhibit D to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion ("Ex. D"), 28:15-17; 29:4-5, 39:2-5.]

That testimony is supported by the form (CDC-135) the CDC uses when initial placement determinations are made. This form provides only three pieces of information: Name/ Number, Security/Custody Level, and **Ethnicity/Race**. [Ex. C, 38:13-14; Exhibit E to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion ("Ex. E").] CDC control sergeants, the CDC personnel who make actual cell assignments, use the information provided on the CDC-135 form to determine where prisoners will be housed. [Ex. C, 38:8-14, 21-22; 39:3-6, 15-21.] Because there are legitimate reasons for having a prisoner's name/number and knowing his or her security/custody level when making cell assignments, the CDC-135 speaks for itself in revealing that race/ethnicity is the primary (indeed, the sole) discretionary factor in determining cell housing decisions. [Ex. E.]

The CDC designated Associate Warden Schulteis as the person most knowledgeable at the California State Prison – Lancaster (where plaintiff Garrison Johnson currently is housed) regarding cell housing assignment policies and procedures. In her deposition, she described the CDC's Initial Placement Practice:

> A: Initially we will look for – if we have a black inmate, we're going to look for an empty house that's got no inmates in it or a house that has one black inmate in it.

Q: Why would you look for one with a black inmate?

A: If you have a black inmate that you're trying to house, you generally put them with another black inmate. If you have a white inmate you're trying to house, you generally put them with a white inmate. [Ex. C, 21:12-20.]

. . . .

Q: Why as a practice do you put a black with a black and a white with a white?

A: Or a Hispanic with a Hispanic.

Q: Or a Hispanic with a Hispanic.

A: My whole career we've done that. My whole entire 24 years with the Department it is what the Department has done. [Ex. C, 22:10 - 16.]

Schulteis also described the Initial Placement Practice as it relates to dormitory housing:

Q: How is race used in those dorms in terms of separation?

A: The way the beds are laid out, they have double bunks and triple bunks. And the stack will be either black, white, Hispanic, or blacks with others, white with others, or Hispanic with others. You'll have a black bed, a white bed, and a Hispanic bed. That's

the ideal situation. . . . [Ex. C, 33:13 - 20.]

Director Steven Cambra reaffirmed that the CDC employs a practice of using race as a factor to segregate its inmates:

Q: What factors are taken into consideration in determining who [a newly arrived inmate's] cellmate is going to be?

. . . .

A: Well, what I would do, you know, is I consider their ethnicity, I consider their, you know, custody. . . . [Ex. D, 28:15-17; 29:4-5.]

. . . .

Q: Is it ever likely that someone would not necessarily be housed with someone of their same race on initial placement in an institution?

A: No. That would be the practice. [Ex. D, 39:1 - 5.]

The CDC deponents attempted to give justifications for the CDC's unconstitutional practices:

Q: . . . in the 25 years you've been with the Department, there's been no change in terms of integration of prisons in terms of the Department's policies toward integration?

A: Towards celling, putting inmates in cells, no, there has not been any change in the practice. . . . To make a move to house whites with blacks, blacks with Hispanics, you know, across the board would cause great problems in this institution. It would cause violence. It would cause us more problems than is even imaginable because of their strong feelings about who they have to live with and who they have to spend an inordinate amount of time in such a really small space. [Ex. C, 27:1 - 28:24.]

Schulteis also tried to justify the CDC's practice when she was questioned concerning the cell assignments of prisoners whose ethnicity was listed as "other." Focusing on Asians, she said:

A: Asians are also classified as "others." And with the Asian population, the control sergeants have to be more careful than they do with whites, blacks, and Hispanics because, for example, you cannot house a Japanese inmate with a Chinese inmate. You cannot. They will kill each other. They won't even tell you about it. They will just do it. The same with Laotians, Vietnamese, Cambodians, Filipinos. You have to be very careful about housing other Asians with other Asians. It's very culturally heavy. [Ex. C, 32:20 - 33:4.]

Director Cambra also attempted to justify the CDC's Initial Placement Practice of segregating prisoners by race based on fears that racial confrontation and violence would

occur if the CDC were to change its practice and integrate its cells:

Q: Can you explain a little bit about why you would take ethnicity into consideration?

A: Well, I don't want to be charged with setting inmates up to be injured, and in the prison society, if I – if I just take two inmates and have total disregard for their ethnicity and say, "Okay. You're white and you're black. I'm going to put you into this cell together. Have a nice day," I feel I am putting myself in a position that I could be charged with setting up one of them to be injured, because in our prison society, inmates tend to associate along ethnic lines and along their – their own race. . . . [Ex. D, 29:12-23.]

Although the CDC deponents claimed that the justification for the CDC practice of cell segregation is based on fear of violence, the CDC was unable to provide in discovery in this action any evidence to support that position. This was perhaps most telling in the CDC's explanation of why it would not place persons of different races or ethnicities in the same bunk. Associate Warden Schulteis explained:

A: We could not house a black inmate and put a white inmate on top of him.

Q: Why?

A: That would cause problems. That would cause a lot of problems.

Q: But they can be right next to each other?

A: They can be next to each other, but they cannot be on top of each other.

Q: And –

A: It would cause a fight right on the spot.

Q: And how do you know this?

A: It's happened.

Q: You have done – in your experience?

A: Yes. Mistakes have been made. That would be titled a grievous error on the part of a control sergeant to do something like that.

Q: Has that happened in your experience at this prison?

A: Not at this prison, but at CCI it has

Q: And would there be a report of the grievous error in that situation?

A: . . . If anything it would have been a letter of contact, which only lasts in the supervisory file for 90 days. . . .

Q: Is this practice written down?

A: I don't believe so. I have never seen it written down. [Ex. C, 34:5 - 35:13.]

Director Cambra confirmed the absence of reported or recorded incidents of violence resulting from a decision being made to integrate a cell:

Q: . . . [H]ave there ever been any situations where two inmates of two different races were celled together and problems resulted because of it?. . . .

A: Well, I can't – I can't recall too many situations where inmates of opposite races were celled together and there was a problem, no.

Q: Can you recall any such situation?

A: No. Not specifically, no. [Ex. D, 32:19 - 33:5.]

. . . .

Q: Would it be fair to say that in those eight or nine years [of performing managerial duties for the CDC], if there had been incidents of violence or other problems resulting from a cell housing decision dealing with a white being put with a black, or a white being put with a Mexican, or some interracial housing decision, that you would have heard about it?

A: Well, we receive all incident reports, so if it was – if it was an assault, you know – in other words, if it was a crime that resulted in some injury, yes. [Ex. D, 33:23 - 34:6.]

In sum, Associate Warden Schulteis and Director Cambra described the CDC's unvarying practice of segregating by race/ethnicity when housing assignments are made. In addition, they attempted to explain the CDC's "justifications" for why people of different races and/or ethnic backgrounds cannot live together in confined quarters. One of their primary justifications was that cell or bunk integration would lead to violence. However, they failed to point to a single incident of violence following any cell integration attempt. Schulteis had only one vague memory of an incident at another institution for which the paperwork could not possibly be found. Additionally, she expressly admitted that no violence of this type had occurred at the Lancaster institution where plaintiff Johnson is housed.

Although the CDC claims to have a "compatibility" practice in place that allows prisoners to request to switch cellmates, that practice does not regularly allow for members of different races to share cells. Plaintiff Johnson testified that he did understand that if he found a "compatible" cellmate, he could request a cellmate switch. However, he never believed that he could request a cellmate who was not African American.[2] [Ex. B, 40:12-17, 41:24 - 43;24.]

2. Although Johnson was informed at his deposition that he "could have" requested a cell mate of a different race, that was the first time he was presented with such information, and it was contrary to everything he had observed in his 16 years at CDC-controlled facilities.

Johnson has observed that the only exceptions to the CDC's Initial Placement Practice occur when the CDC has to find a place to house prisoners that it has labeled as "other." Examples of "other" include Asians and Native Americans. Johnson has observed that, on occasion, a person labeled as "other" may be housed with a person not classified as "other."

Apart from those limited exceptions, however, Johnson has never seen anybody of one ethnicity placed into a cell with somebody of a different ethnicity. For example, he has never seen a Caucasian person placed with an African American, or an African American person placed with an Asian. Johnson bases his observations on his sixteen years of experience as a prisoner within the CDC system. [Ex. B, 40:3-7.]

Johnson believed that CDC officials would never grant a request by an African American inmate such as himself to be housed with a prisoner of a different race because he understood that the CDC was enforcing a policy or practice that prohibited integration of persons of different races or ethnicities within CDC cells. Johnson also believed and still believes that the CDC's policy or practice leads to increased racial tension and increased racial rioting stemming from these tensions. He therefore seeks entry of an Order by this Court invalidating that practice.

Appendix F

VI. PLAINTIFF IS ENTITLED TO SUMMARY ADJUDICATION ON THE ISSUES OF LIABILITY BECAUSE THE CDC, UNDER THE DIRECTION OF THE DIRECTOR DEFENDANTS, HAS EMPLOYED AND CONTINUES TO EMPLOY A PRACTICE OF RACIAL SEGREGATION IN VIOLATION OF THE UNITED STATES CONSTITUTION. AND NO MATERIAL FACTS ARE IN DISPUTE REGARDING THOSE VIOLATIONS

Summary adjudication or partial summary judgment is appropriate when, as here, there is no genuine issue of material fact as to a particular claim or claims, and the Court can enter an Order that defendants are liable to plaintiff for monetary damages and/or injunctive relief, the specifics of which will be determined at a trial on damages. Fed. Rule of Civil Procedure 56(a).

The CDC is, of course, an agency of the State. Race-based decision making on behalf of a State directly violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The fact that more than one CDC official has acted to implement the CDC's practice makes such actions a conspiracy to deprive plaintiff of the equal protection of the law under 42 U.S.C. § 1985(3). The State of California, acting through the past and present CDC directors, has no legally cognizable justification for employing its racially-based Initial Placement Practice. Accordingly, plaintiff is entitled to entry of judgment in his favor on the issue of defendants' liability on the second and third claims for relief.

Appendix F

A. *The CDC's Initial Placement Practice Violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution*

The undisputed evidence in the record of this case establishes that the CDC has an Initial Placement Practice of segregation on the basis of race or ethnicity such that when prisoners arrive at a CDC-controlled facility, they are assigned to a bed or a cell based on (1) their gender, (2) their custody level, and (3) their race or ethnic background. The first two categories are permissible under the law; the third category is not.

The Fourteenth Amendment of the Constitution provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Supreme Court has repeatedly held that this protection extends to prison inmates: The Fourteenth Amendment prohibits racial discrimination within prisons, and that prohibition extends to racial segregation of inmates. *Lee v. Washington*, 390 U.S. 333 (1968); *Cruz v. Beto*, 405 U.S. 319, 321 (1972); *Turner v. Safely*, 482 U.S. 78, 84 (1987).

Lee and *Cruz* recognized that "racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for 'the necessities of prison security and discipline.'" *Lee*, 390 U.S. at 334; *Cruz*, 405 U.S. at 321. Later decisions interpreting those Supreme Court cases have concluded that generalized fears of violence do not justify maintaining a policy of racial segregation like that practiced by the CDC in this case.

B. *Segregation of Prisoners by Race Cannot be Justified by a Generalized Desire to Avoid the Possibility of Racial Confrontation and Violence*

The justifications for racial segregation advanced by Schulteis and Cambra on behalf of the CDC are similar to the explanations given- and rejected – by the wardens at the Louisiana State Penitentiary (Angola) and the Columbus Correctional Facility in Columbus, Ohio in the cases of *Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994) and *Stewart v. Rhodes*, 473 F. Supp. 1185 (D.C. Ohio, 1979).

In *Sockwell*, the Court of Appeals expressly held that a general policy of racially segregating two-person cells at the Angola penitentiary violated prisoners' rights to Equal Protection, despite the warden's contention that security and discipline concerns demanded such segregation. The Court explained that "a generalized or vague fear of racial violence is not a sufficient justification for a broad policy of racial segregation. . . . If violent disruptions did occur [as a result of cell housing integration,] we would expect the prison officials to take appropriate action against the offending prisoners, black or white." *Sockwell*, 20 F.3d at 191. The court ultimately decided that any segregation to prevent racial violence must be based on individualized analysis. *Id.*

In *Stewart,* the Ohio prison superintendent testified that the practice of segregation in that institution "stems from the prison administration's desire to reduce the possibility of racial tension and potential violence which it fears will result from celling black and white inmates together. . . . [Because [the prison] is the initial reception center, . . . the

administration has insufficient information concerning the [prisoner's] background to integrate them in the two-man reception cells where officials fear racial bias might flair into violence." *Stewart*, 473 F. Supp. 1187-88.

The court there held that the foregoing purported justification violated the Constitution:

> The Court is fully cognizant of the problems with which prison administrators, faced with increasing prison populations and decreasing space and funding, must deal. Further, it is clear that federal courts must defer in many matters to the expert judgment of these administrators, particularly in matters of internal security and order. The Supreme Court recently firmly reiterated this principle:
>
> > [T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Bell v. Wolfish*, 441 U.S. 520 (1979).

On the other hand, it is equally clear that prisoners are not stripped of all constitutional rights at the

> prison gate. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). The Court must strike a proper balance. . . . Although defendants contend that . . . the practice of segregation . . . [is] necessary for institutional security, the Court is not persuaded that such measures are in fact required to preserve internal order and discipline or to maintain institutional security.

The court also noted that "[i]t is clear that segregation by cell is no more permissible than segregation on a broader basis, for example by block." *Id.* at 1189, fn. 4. That finding sheds light on the following "justification" advanced by Director Cambra:

> Q: Why then – if the CDC has an anti-segregation policy and is interested in helping the prisoners to eliminate their own racial hatred, why, then, does the department continue to condone, you know, not putting someone of one race with someone of another race in – in the cells, particularly in light of the fact that you are not aware of any incidents of violence that have occurred based on such a decision. [Ex. D, 51:18 - 25.]
>
> A: I would answer that by saying that in the areas on the yard and the work areas, and what have you, the staff have much better visibility and observation in those areas to intercede if there is a problem, as opposed to that cell. It is two individuals, door closed. Out of sight, out of mind. And – and that's a pretty risky situation. [Ex. D, 52:18-24.]

Cambra's vague fears of violence, not based on any particular incidents, but rather on the belief that all black and white prisoners housed together, all Chinese and Japanese prisoners housed together, all black and Hispanic prisoners house together, etc. will do each other violence, place him and the CDC's purported justifications squarely within the rulings of *Sockwell* and *Stewart*. Just as such justifications failed in *Sockwell* and *Stewart,* they fail here. Plaintiff is entitled to entry of judgment invalidating the CDC's Initial Placement Practice.

C. *Defendants' Actions Have Violated Johnson's Civil Rights.*

It has long been recognized that a civil rights action pursuant to 42 U.S.C. § 1983 and § 1985(3) is a proper remedy for a state prisoner to make a constitutional challenge to the conditions of prison life and obtain appropriate damages. *See, e.g., Wilson v. Nevada Dep't. of Prisons,* 511 F. Supp. 750 (D.C. Nev. 1981). In *Sockwell* the Fifth Circuit was quick to conclude that the very same acts that deprived the segregated prisoner plaintiffs in that case of their Constitutional right to equal protection similarly violated 42 U.S.C. § 1983. *See, Sockwell*, 20 F.3d at 192. The same is true here. Accordingly, plaintiff Johnson is entitled to entry of judgment adjudicating the liability of the current and former CDC Director defendants.

Appendix F

V. CONCLUSION

The undisputed evidence establishes that without adequate justification, the California Department of Corrections segregates inmates by race or ethnicity when they are assigned to housing upon arrival at CDC-controlled institutions. Such segregation is unconstitutional. Plaintiff Johnson's Motion for Summary Adjudication regarding the issue of liability on the second and third claims for relief should be granted. A trial on the remaining issues of damages and injunctive relief on those claims for relief and on all issues presented by the first claim for relief should be set for the very near future.

DATED: April 9, 2001

Respectfully submitted,

PROSKAUER ROSE, LLP
BERT H. DEIXLER
JEFF GARCIA HILGER

By: s/ Jeff Garcia Hilger
JEFF GARCIA HILGER
Attorneys for Plaintiff
GARRISON JOHNSON

APPENDIX G—STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF MOTION BY PLAINTIFF GARRISON JOHNSON FOR SUMMARY ADJUDICATION OF HIS SECOND CLAIM FOR RELIEF (VIOLATION OF EQUAL PROTECTION) AND HIS THIRD CLAIM FOR RELIEF (CONSPIRACY TO DENY CIVIL RIGHTS) DATED APRIL 9, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV 95-1192-CBM (BQR)

GARRISON JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al,

Defendants.

STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW IN SUPPORT OF MOTION BY PLAINTIFF GARRISON JOHNSON FOR SUMMARY ADJUDICATION OF HIS SECOND CLAIM FOR RELIEF (VIOLATION OF EQUAL PROTECTION) AND HIS THIRD CLAIM FOR RELIEF (CONSPIRACY TO DENY CIVIL RIGHTS)

[Filed concurrently with Notice of Motion and Motion for Summary Adjudication, Memorandum of Points and Authorities in Support thereof, and Declaration of Jeff Garcia Hilger]

Appendix G

Hon. Consuelo B. Marshall

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

After consideration of (1) the papers in support of and in opposition to plaintiff's motion for summary adjudication of liability issues on the second and third claims for relief, and (2) the oral argument of counsel, the Court determines that the following facts have been established as,

UNCONTROVERTED FACTS

1. Garrison Johnson has been living in institutions controlled by the California Department of Corrections ("CDC") since 1986. [Deposition of Garrison Johnson, Exhibit B to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion ("Ex. B"), 17:10-11, 22-23 and 22:17-18.]

2. Garrison Johnson is an individual of African American descent. [Ex. B, 24:5-7.]

3. When Garrison Johnson arrived at the first CDC institution to which he was assigned, he was told that he had to be placed in a "black cell." [Ex. B, 39:8-10.]

4. When Garrison Johnson arrived at the first CDC institution to which he was assigned, he was told that in any CDC prison to which he was assigned, he would be placed in a cell based on his skin color. [Ex. B, 39:19-21.]

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5. Garrison Johnson has never had any cellmate who was not of African American descent. [Ex. B, 39:7 - 40:17.]

6. CDC control sergeants are responsible for assigning new prisoners to cells. They use form CDC- 135 to make inmate bed assignments. [Deposition of Linda Schulteis, Exhibit C to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion ("Ex. C"), 38:8 - 39:21.]

7. Form CDC-135 lists an inmate's name, ethnicity and custody level. [Ex. C, 38:13-14; Exhibit E to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion, ("Ex. E").]

8. For at least the past 24 years, the CDC's custom and practice has been to place a new inmate of one racial or ethnic background into a cell with an inmate of the same racial or ethnic background. [Ex. C, 21:9-20, 22:10-16, 39:15-21; Deposition of Steven Cambra, Exhibit D to the Declaration of Jeff Garcia Hilger, filed concurrently with this Motion ("Ex. D"), 28:15-17; 29:4-5; 39:2-5.]

Based on the foregoing Uncontroverted Facts, the Court now makes its

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action, pursuant to 28 U.S.C. § 1331.

2. Segregation of individuals by race in prisons violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. [*Lee v. Washington*,

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390 U.S. 333, 334 (1978); *Cruz v. Beto*, 405 U.S. 319, 321(1972); *Turner v. Safely*, 482 U.S. 78, 84 (1987).]

3. General fears of violence are not a legal justification for segregation of prisoners by race. [*Sockwell v. Phelps*, 20 F.3d 187, 190 (5th Cir. 1994); *Stewart v. Rhodes*, 473 F. Supp. 1185, 1187 (D.C. Ohio 1979).]

4. The CDC's initial placement practice that segregates inmates based on their race or ethnic background violates the Equal Protection Clause of the United States Constitution.

5. The present and former Directors of the CDC, acting in their individual capacities, and the present Director of the CDC, acting in his representative capacity, are liable for monetary damages and/or injunctive relief to be determined at a trial on damages because the CDC initial placement practice that they have implemented violates prisoners' rights to Equal Protection of the laws. 42 U.S.C. § 1985(3).

DATED: April 9, 2001

PROSKAUER ROSE, LLP
BERT H. DEIXLER
JEFF GARCIA HILGER

By: s/ Jeff Garcia Hilger
JEFF GARCIA HILGER
Attorneys for Plaintiff
GARRISON JOHNSON

APPENDIX H — DECLARATION OF JEFF GARCIA HILGER IN SUPPORT OF MOTION BY PLAINTIFF GARRISON JOHNSON FOR SUMMARY ADJUDICATION OF HIS SECOND CLAIM FOR RELIEF (VIOLATION OF EQUAL PROTECTION) AND HIS THIRD CLAIM OF RELIEF (CONSPIRACY TO DENY CIVIL RIGHTS) DATED APRIL 9, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV 95-1192-CBM (BQR)

GARRISON JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al,

Defendants.

DECLARATION OF JEFF GARCIA HILGER IN SUPPORT OF MOTION BY PLAINTIFF GARRISON JOHNSON FOR SUMMARY ADJUDICATION OF HIS SECOND CLAIM FOR RELIEF (VIOLATION OF EQUAL PROTECTION) AND HIS THIRD CLAIM OF RELIEF (CONSPIRACY TO DENY CIVIL RIGHTS)

[Filed concurrently with Notice of Motion and Motion by Plaintiff Garrison Johnson for Summary Adjudication, Memorandum of Points and Authorities in Support Thereof, and Statement of Uncontroverted Facts and Conclusions of Law]

Appendix H

Hon. Consuelo B. Marshall

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

DECLARATION OF JEFF GARCIA HILGER

I, JEFF GARCIA HILGER, declare as follows:

I. I am an attorney at Proskauer Rose LLP, counsel for Plaintiff Garrison Johnson and am duly admitted to practice before all courts of the State of California and this Court. The facts stated herein are personally known to me and I could and would testify competently thereto if called upon as to do so.

2. Attached as Exhibit A is a true and correct copy, provided by Westlaw, of the Ninth Circuit's opinion in *Garrison Johnson v. State of California, et al.*, 207 F.3d 650 (9th Cir. 2000)

3. Attached as Exhibit B are true and correct copies of relevant excerpts of deposition testimony of Garrison Johnson taken on October 5, 2000.

4. Attached as Exhibit C are true and correct copies of relevant excerpts of deposition testimony of Linda L. Schulteis taken on December 6, 2000.

5. Attached as Exhibit D are true and correct copies of relevant excerpts of deposition testimony of Steven Cambra taken on March 2, 2001.

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6. Attached as Exhibit E is a true and correct copy of CDC form CDC-135 as provided to me by California's Deputy Attorney General Sara Turner.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed April 9, 2001 at Los Angeles, California.

s/ Jeff Garcia Hilger
JEFF GARCIA HILGER

Appendix H

EXHIBIT A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 98-55302

Submitted Oct. 8, 1999.[1]

Garrison S. JOHNSON,

Petitioner-Appellant,

v.

STATE OF CALIFORNIA; James H. Gomez, Director, Department of Corrections; James Rowland,

Respondents-Appellees.

Filed March 21, 2000

Appeal from the United States District Court for the Central District of California; Kim M. Wardlaw, District Judge, Presiding. D.C. No. CV-95-01192-KMW.

Before: FLETCHER, D.W. NELSON, and BRUNETTI, Circuit Judges.

1. The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R.App. P. 34(a); 9th Cir. R. 34-4.

Appendix H

PER CURIAM.

Appellant, Garrison Johnson, is a prisoner incarcerated in the State of California. He filed the instant suit claiming that the California Department of Corrections ("CDC") violated his constitutional rights by segregating inmates according to race and extorting money from inmates by overcharging for telephone use. This is an appeal from the district court's order granting the State's motion to dismiss on grounds that the action is time-barred and otherwise fails to state a claim.

I. FACTS AND PROCEDURAL HISTORY

Garrison Johnson filed the instant suit pro se, asserting causes of action under 42 U.S.C. §§ 1981, 1983, 1985, and 1986. Johnson's primary allegations are (1) that between 1987 and 1991, the former Director of the Department of Corrections, James Rowland, instituted and enforced a policy of housing inmates according to race, and (2) that warden Rowland was engaged in a conspiracy to extort money from inmates through charges for telephone calls. The same allegations are made against the current Director, James Gomez, for the period covering 1991 to the present. Johnson contends that these actions violated his right to due process under the Fifth Amendment, his right to be free from cruel and unusual punishment under the Eighth Amendment, and his right to due process and equal protection of the laws under the Fourteenth Amendment. He seeks damages and declaratory relief.

Johnson filed his original complaint on February 24, 1995. After a series of amendments in response to motions to dismiss, Johnson filed a Third Amended Complaint. The State again moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure and the district court adopted a report and recommendation from the magistrate judge dismissing the case with prejudice. We have jurisdiction pursuant to 28 U.S.C. § 1291. We reverse in part and affirm in part.

II. STANDARD OF REVIEW

Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure is reviewed de novo. *See Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir.1998). All factual allegations of the complaint are accepted as true and all reasonable inferences must be drawn in favor of the nonmoving party. *See id.*; *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir.1987). Moreover, "[t]he Supreme Court has instructed the federal courts to liberally construe the 'inartful pleading' of pro se litigants," *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir.1987) (citing *Boag v. MacDougall*, 454 U.S. 364, 365, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982)), and we have emphasized that the rule of liberal construction is "particularly important in civil rights cases." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir.1992) (citing *Eldridge*, 832 F.2d at 1137).

Dismissal on statute of limitations grounds is a question of law reviewed de novo. *See Hernandez v. City of El Monte*, 138 F.3d 393, 398 (9th Cir.1998).

III. DISCUSSION

A. Statute of Limitations

Because § 1983 does not contain a statute of limitations, federal courts apply the forum state's statute of limitations for personal injury claims. *See Wilson v. Garcia*, 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). In California, the applicable statute of limitations is one year. *See Elliott v. City of Union City*, 25 F.3d 800, 802 (9th Cir.1994); Cal.Civ.Proc.Code § 340(3).[2]

When not inconsistent with federal law, we also apply the law of the forum state regarding tolling. *See Hardin v. Straub*, 490 U.S. 536, 537-39, 543, 109 S.Ct. 1998, 104 L.Ed.2d 582 (1989); *Bacon v. City of Los Angeles*, 843 F.2d 372, 374 (9th Cir.1988). However, federal law controls the question of when a claim accrues. *See Elliott*, 25 F.3d at 801-02. Under federal law, a claim accrues when the plaintiff knows, or should know, of the injury which is the basis of the cause of action. *See Kimes v. Stone*, 84 F.3d 1121, 1128 (9th Cir.1996).

Prior to the enactment of § 352.1(a) of the California Code of Civil Procedure on January 1, 1995, prisoners serving less than a life sentence could toll claims for their entire sentence. *See Elliott*, 25 F.3d at 802. Under § 352.1(a), however, the tolling period is limited to two years. The report

2. A one year statute of limitations also applies to actions under 42 U.S.C. §§ 1981, 1985 and 1986. *See Taylor v. Regents of the Univ. of California*, 993 F.2d 710, 711-12 (9th Cir.1993); *McDougal v. County of Imperial*, 942 F.2d 668, 673-74 (9th Cir.1991).

and recommendation ("R & R") of the magistrate judge held that all claims in the complaint against former warden Rowland are time- barred. He reasoned that Johnson's causes of action accrued at least by 1991, and that even with the two year tolling provision for prisoners in Cal.Civ.Proc.Code § 352.1(a) added to the one year statute of limitations, his claims were time barred in 1994.

The district court failed to consider whether § 352.1(a) can be applied retroactively to plaintiffs whose causes of action accrued before January 1995. In *Fink v. Shedler,* 192 F.3d 911 (9th Cir.1999), the Ninth Circuit answered this retroactivity question. After considering an analogous issue under Arizona law raised in *Tworivers v. Lewis,* 174 F.3d 987, 993 (9th Cir.1999), as well as the implications of giving § 352.1(a) either complete retroactive or exclusively prospective effect, the court adopted a middle course. We held that "claims ... that accrued before January 1, 1995 are tolled for two years from accrual, or until January 1, 1995, *whichever occurs later,* as long as such an application does not result in manifest injustice." *Fink,* 192 F.3d at 916 (emphasis added) (citing *Tworivers,* 174 F.3d at 995-96; *Parker,* 975 F.Supp. at 1272). Under the rule in *Fink,* Johnson's claims against warden Rowland are timely since they are tolled until January 1, 1995, and he filed suit on February 24, 1995, well within the one year statute of limitations.[3]

---

3. Although state tolling rules do not apply to Johnson's § 1986 claim, *see Donoghue v. County of Orange,* 848 F.2d 926, 930 n. 3 (9th Cir.1987), the federal equitable tolling doctrine may. *See Ellis v. City of San Diego,* 176 F.3d 1183, 1189 n. 3 (9th Cir.1999). (Cont'd)

B. Merits

As to both warden Rowland and warden Gomez, the R & R concluded that Johnson failed to state a claim upon which relief could be granted. More specifically, the magistrate judge found that the complaint impermissibly relied on conclusory allegations despite three opportunities to amend, guidance from the court as to what must be alleged, and specific admonitions regarding the heightened pleading standard set forth in *Branch v. Tunnell* for constitutional torts involving an element of intent. *See Branch,* 14 F.3d 449, 452, 455-56 (9th Cir.1994) (holding that plaintiffs " 'must

---

(Cont'd)
On remand, Johnson should be given the opportunity to allege when he became aware of the facts supporting his § 1985 conspiracy claim. *See infra,* section III.B.1. This will permit the district court to determine whether the § 1986 claim is saved under the equitable tolling doctrine.

In his opposition to warden Rowland's motion to dismiss, Johnson states that "Rowland misrepresented the issue of racial segregational housing by misleading plaintiff to believe that he did not have a constitutional right not to be segregated and plaintiff did not discover the misrepresentation until 1994." Assuming the complaint is amended on remand to incorporate this allegation, the district court should also consider whether the doctrine of equitable estoppel applies. *See Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, 79 S.Ct. 760, 3 L.Ed.2d 770 (1959) (defendant may be estopped from asserting statute of limitations where plaintiff's delay in filing was caused by reliance on defendant's misrepresentations as to governing law), *cited and followed in, American Pipe & Const. Co. v. Utah,* 414 U.S. 538, 559, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974).

state in their complaint nonconclusory allegations setting forth evidence of unlawful intent. The allegations of facts must be specific and concrete enough to enable the defendants to prepare a response, and where appropriate, a motion for summary judgment based on qualified immunity.'") (quoting and reaffirming *Branch v. Tunnell,* 937 F.2d 1382, 1386 (9th Cir.1991)). The State urges that we affirm on the same grounds.

1. Racial discrimination

According to well established precedent, "[p]risoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race." *Wolff v. McDonnell,* 418 U.S. 539, 556, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (citing *Lee v. Washington,* 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968)); *see also Turner v. Safley,* 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987) (noting that "federal courts must take cognizance of the valid constitutional claims of prison inmates. Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."). More specifically, "racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for 'the necessities of prison security and discipline.'" *Cruz v. Beto,* 405 U.S. 319, 321, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972) (per curiam) (quoting *Lee,* 390 U.S. at 334, 88 S.Ct. 994).

Johnson's Third Amended Complaint makes the following allegations in support of the claim that Rowland

and Gomez enforced a policy of racial segregation in inmate housing:

> (1) that the wardens confined Johnson to a two-man cell "upon the basis of his skin color," and that this caused him to be subjected to racial assault by other inmates;
>
> (2) that Rowland and Gomez authorized the wardens of other California prisons to segregate inmate housing according to race, ("segregatively confining 'Blacks' in a two-man cell only therefore, prohibiting Black inmates from being 'celled' with 'White' or 'Mexican' inmates");
>
> (3) that this housing segregation policy was not related to a legitimate penological interest and caused racial tension and riots among different ethnic groups;
>
> (4) that Rowland and Gomez were aware that racially dividing inmates "breed [s] enmity and racial tension," but have an interest in enforcing the segregation policy "because prison officials are paid higher wages during a racial crisis that involve[s] inmates rioting"; and
>
> (5) that the wardens have failed to institute procedures to eradicate the policy, despite a 1994 "federal order to stop housing inmates based on their color or ethnicity; but rather place them in the first available cell."

Although inartfully stated, these allegations are sufficient to state a claim for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Johnson in essence alleges that a policy of racial segregation in housing has been enforced on him and other inmates throughout the prison system for over a decade. He alleges that the wardens are aware of the deleterious effects of race-based housing, that the practice serves no legitimate penological purpose, and that the practice persists despite a court order in 1994 to house inmates in a race-neutral manner. He even identifies a potential motive for the segregation policy. The district court erred in dismissing this aspect of Johnson's complaint.

The district court also erred in dismissing Johnson's § 1985(3) conspiracy claim with prejudice. Although "[a] mere allegation of conspiracy without factual specificity is insufficient," *Karim-Panahi v. Los Angeles Police Dep't,* 839 F.2d 621, 626 (9th Cir.1988), the complaint here contains more than a bare allegation of conspiracy, and additional facts in support of the alleged conspiracy may develop as Johnson proceeds with discovery on his equal protection claim. With leave to amend, Johnson may also be able to state a claim for violation of his Eighth Amendment rights insofar as his personal safety has been jeopardized by defendants' policy of racial segregation. *See Helling v. McKinney,* 509 U.S. 25, 31, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) ("the treatment a prisoner receives and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment"); *Toussaint v. McCarthy,* 801 F.2d 1080, 1107 (9th Cir.1986) (prison officials must provide prisoners with "personal safety" since it is a "basic human need"); *Hoptowit*

v. Ray, 682 F.2d 1237, 1250 (9th Cir.1982) ("Prison officials have a duty to take reasonable steps to protect inmates from physical abuse"; holding that excessive level of violence among inmates constitutes cruel and unusual punishment) (citing *Ramos v. Lamm,* 639 F.2d 559, 572 (10th Cir.1980)).

However, Johnson's due process claims were properly dismissed with prejudice. Because the Equal Protection Clause covers the actions challenged in the complaint, Johnson may not proceed on a substantive due process theory. *See Patel v. Penman,* 103 F.3d 868, 874 (9th Cir.1996). Nor is a procedural due process claim cognizable where the existence of an unconstitutional policy (segregated inmate housing), rather than the procedure which leads to it, is challenged.

2. Overcharging for Telephone Use

Johnson alleges that Respondents conspired with telephone companies to overcharge inmates in exchange for "kickbacks." He claims that a comparison of phone bills reveals that "phone calls plaintiff made to [friends and family members] cost them . . . more than a non-incarcerated person who made a call from the same area where plaintiff is incarcerated." As a result of the overcharging, he claims that his mother's phone service was canceled and she now has a mandatory "block" on the phone preventing her from making calls to the prison.

Although prisoners have a First Amendment right to telephone access, this right is subject to reasonable limitations arising from the legitimate penological and administrative

interests of the prison system. *See Strandberg v. City of Helena*, 791 F.2d 744, 747 (9th Cir.1986). There is no authority for the proposition that prisoners are entitled to a specific rate for their telephone calls and the complaint alleges no facts from which one could conclude that the rate charged is so exorbitant as to deprive prisoners of phone access altogether. Instead, Johnson admits in the complaint that his mother lost phone service in large measure because of a failure to pay the charges for high frequency use, not just rates for prison calls. Moreover, Johnson's conspiracy allegations are quintessentially vague and conclusory. The district court properly dismissed this aspect of the complaint with prejudice.

IV. APPOINTMENT OF COUNSEL

Although Johnson's complaint states cognizable claims, clarity and legal precision are wanting. The case will undoubtedly proceed more efficiently and effectively if Johnson has legal representation. Accordingly, on remand the district court shall request the appointment of pro bono counsel pursuant to 28 U.S.C. § 1915(a).

V. CONCLUSION

The judgment of the district court is affirmed in part and reversed in part. On remand, Johnson shall be granted leave to amend his complaint following the appointment of counsel.

AFFIRMED IN PART AND REVERSED IN PART. Each party shall bear their own costs.

EXHIBIT B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV-95-01192
CBM (BOR)

GARRISON S. JOHNSON, an individual,

Plaintiff,

vs.

STATE OF CALIFORNIA; JAMES H. GOMEZ, an individual; JAMES ROWLAND, an individual; and DOES 1 through 20, inclusive,

Defendants.

DEPOSITION OF
GARRISON S. JOHNSON
LANCASTER, CALIFORNIA
OCTOBER 5, 2000

* * *

[commencing at page 17] Q Local jails?

A L.A. County jail.

Q Always the same then?

A Yeah.

Q And the youth authorities; is that correct?

A I've never been in a youth authority.

Q Never been in a youth authority institution; is that correct?

A That's correct.

Q So when were you first incarcerated on your present sentence then?

A In '97.

Q Then you were housed in CIM for a reception period; is that correct?

A Yes.

Q Then did you go to Folsom after that?

A Yes, I did.

Q Then after Folsom where did you go?

A To Calipatria.

Q Did you say in your present sentence it was '97 or did you say '87?

A I made a mistake. I meant '86.

Q '86, okay. Why did you transfer from Folsom?

A I think it was a voluntary thing. They asked the inmates did they want to go to Calipatria. It was

* * *

[22] Q I'm not aware of any policy. I mean, I have never located one. And I am just wondering if you had -- you indicated you've never seen one?

A So are you saying there is no policy?

Q Well, I'm not saying that. I don't know. But so far we've never been able to come up with a policy.

A I haven't read one.

Q You have not. Okay. I thought maybe you might have something. Have you read Title 15?

A Yes, I have.

Q So it's certainly not the source of your policy; correct?

A That's correct.

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Q Let me ask you about your education. Did you graduate from high school?

A No.

Q Have you been getting some education while you've been here in prison since '86?

A Yep.

Q What level have you achieved would you say towards graduation from high school?

A Well, I attempted to take my GED one time. I got up to where I registered in 10th grade.

Q Approximately 10th grade then?

A Yeah.

* * *

[24] A Probably four to five different races in the system.

Q Four to five different races?

A Uh-huh.

Q What race are you a member of?

A The African-American.

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Q The African-American race. Now, you mentioned a practice of housing inmates based solely on their race. Would you say that is one of your complaints?

A Yes, I would.

Q Can you tell me what that practice is?

A Yes. That practice is simply how inmates are housed based on the color of their skin. They put you in cells -- if you are black, they look for a cell that has a black person. If you are white, they look for a cell that has a white person. They match you up based on your color.

Q From among those four to five races?

A Yeah. If you're Asian, they are going to look for an Asian. They classify Asians and Samoans as others, so they will look for a cell with the classification of others and they put you in there.

Q You talked about compatibility. Had you ever heard of a practice of housing people based on compatibility?

* * *

[39] A Yeah.

Q Let me get back to my train of thought here. Did you ever request to cell with somebody of a different race who you were compatible with?

A I don't believe I did, no.

Q Why not?

A I was never asked did I want to cell with another race or anything like that. All I know is that when I first came into the system they told me they had to find me a black cell.

Q Who is "they"?

A Whoever the officers are that do the cell assignments when you come into the system.

Q Do you know the officer's name?

A It's been so many years ago when I first came in. I couldn't tell you.

Q So this was when you first arrived at the prison?

A When I first arrived. They said any prison you go to they look for a cell for you based on your skin color.

Q But you did say you could house with anyone who you were compatible with of any race?

MR. HILGER: Objection. Misstates his testimony. He didn't say that.

[40] BY MS. TURNER:

Q If you wanted to house with someone of a different race, you could: isn't that correct?

A I don't have no problem with housing with any color, any ethnicity, different race. No problem.

MR. HILGER: When you are asking if he could, I think he is understanding it in a general sense as to whether he would be able to get along. Not whether he would be able to within the system. I think that question is unclear.

BY MS. TURNER:

Q Okay. So within the California Department of Corrections, if you wanted to house with somebody of a different race than you are, would your request be granted provided both of you agreed to it?

A I don't have no idea whether it would be granted.

Q If you read the interrogatory responses they indicate that that's the system of how they seek to find compatible cell mates.

A So what you are trying to tell me is that you have to ask to be in a cell with a different race if you wanted to live with a different race; otherwise, they just put you in a cell based on the color of your skin?

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[41] Q Well, it's my understanding that the key would be finding someone you're compatible with, period.

A Well, if I'm compatible with someone of my same race. But when you come into the system they don't ask you whether or not you are compatible. What they say is I've got to find you a cell based or your race, and that's where they put you in your cell. You don't find out that you are not compatible with a person until they put you up in here and you all are not on the same wavelength, you all don't see things clearly, you're arguing, then you go tell the person that controls the cells that we can't get along, and that's what incompatibility is all about. We can't get along. Then they try to tell you to go find somebody else that you can get along with.

Q Do you think that's unreasonable?

A I don't know whether it's unreasonable or not.

MR. HILGER: That's sort of vague. When you say "that," I'm not sure what you are referring to.

BY MS. TURNER:

Q That seems to me what you are describing to be your understanding of the practice then?

A Yes.

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Q Do you think that's an unreasonable practice to try to find somebody whom you are compatible with?

[42] A It depends. If they are only going to allow you to house or be in a cell with somebody just your race -- if I tell them I'm not compatible, they expect me to go find somebody else black and try to find compatibility. If I go find somebody white or Mexican or another color and you tell them that me and this guy get along and we want to cell, I don't believe they would let us cell together.

Q Now, what you are saying is you don't believe it, but you've never asked that; is that correct?

A No, I never -- see, that's what I'm saying. The whole system is designed where you house you don't know you are compatible until you get in there. If they house me in a cell with different races, I would know who I can live with. I would know who I could be compatible with other races.

Q But you meet people out in the yards or you meet people through 13 years living in the same place.

A Well, if you've got a system that's been operating like this for I don't know how long, and other inmates -- everything is racially segregated. You can't go to a white guy and say, "Hey, man, I want to move with you." You can't cross the races. That will start the racial tension right there. So I know that I can't go to a white guy and say, "Hey, I want to [43] move with you" because he is not going to move with

Q What if he wants to move with you?

A I'm saying the system creates this.

Q What if he wants to move with you?

A Well, if he wants to move with me, we have got to try to move together.

Q So it would work then; correct?

A It should work.

Q It does, doesn't it?

A No, because you don't see it nowhere. You can go right here in this institution and you won't see no black and white, no black and Hispanic. You won't see it like that.

Q How about Hispanic and white?

A I don't know about that.

Q How about white and Asian?

A I don't know about that.

Q How about Asian and Hispanic?

A I don't know about that, but you won't -- the thing is if you want to be realistic about it, all the other races get along except the blacks. So when it comes to a black issue

and you want to live in a cell with one of them, you won't never see nothing like that. You won't never see it.

Q Well, you know, maybe you haven't seen it, but

* * *

[56] defendants, Mr. Rowland and Mr. Gomez. Why are you seeking punitive damages, if you know?

A Well, as I said earlier, I believe they are responsible.

Q Why do you believe they should pay you money?

A Due to the suffering that I have been subjected to for the numerous years.

Q How many 602s have you filed since you've arrived at prison? Would you know?

A A lot of them.

Q So you are comfortable with filing them if a problem occurs?

A Yes.

Q You know how to write them, in other words?

A Yes.

Appendix H

Q Is there any reason you elect not to file a 602 for the problems you are claiming in this complaint?

A The only thing I could recall when this issue first came up is that I know there was no possible way that they was going to allow me to live in a cell with someone else based on the way they was doing things, so there was no need.

Q But you never asked; correct?

A I knew that they wouldn't do it.

Appendix H

EXHIBIT C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV-95-01192 CBM
(BOR)

GARRISON S. JOHNSON, AN INDIVIDUAL,

PLAINTIFF,

VS.

STATE OF CALIFORNIA; JAMES H. GOMEZ, AN INDIVIDUAL; JAMES ROWLAND, AN INDIVIDUAL; AND DOES 1 THROUGH 20, INCLUSIVE,

DEFENDANTS.

DEPOSITION OF: LINDA L. SCHULTEIS

TAKEN ON: WEDNESDAY, DECEMBER 6, 2000

• • •

[commencing at page 21] WORK FOR THE INMATE AND THEN THE SAME PROCESS STARTS AGAIN.

IF THE INMATE IS TO BE MOVED OFF OF THAT PARTICULAR FACILITY TO ANOTHER FACILITY THAT

WOULD GIVE HIM A BETTER PROGRAM THAN WAS OFFERED ON THE ONE WHERE HE WAS ALREADY ON, HE HAS TO BE PLACED IN A CELL IN AN EMPTY BED, PERHAPS WITH ANOTHER INMATE OF THE SAME RACE.

Q. OKAY. WHY --

A. THAT'S WHAT YOU'RE GETTING AT IS HOW DO WE PLACE THEM?

Q. YEAH.

A. AND INITIALLY WE WILL LOOK FOR -- IF WE HAVE A BLACK INMATE, WE'RE GOING TO LOOK FOR AN EMPTY HOUSE THAT'S GOT NO INMATES IN IT OR A HOUSE THAT HAS ONE BLACK INMATE IN IT.

Q. WHY WOULD YOU LOOK FOR ONE WITH A BLACK INMATE?

A. IF YOU HAVE A BLACK INMATE THAT YOU'RE TRYING TO HOUSE, YOU GENERALLY PUT THEM WITH ANOTHER BLACK INMATE. IF YOU HAVE A WHITE INMATE YOU'RE TRYING TO HOUSE, YOU GENERALLY PUT THEM WITH A WHITE INMATE.

WE ALSO AS A PRACTICE WILL LOOK AT THE AGE AND TRY TO MATCH THE INMATE -- SAY A 40-YEAR-OLD INMATE WITH A 35 TO 45-YEAR-OLD INMATE. IF WE HAVE A 19-YEAR-OLD INMATE OR

20-YEAR-OLD INMATE, WE WILL TRY TO MATCH THEM WITH ANOTHER 19-YEAR-OLD, 20-YEAR-OLD INMATE.

[22] WE ALSO LOOK AT GANG AFFILIATION. NOW, IF AT CLASSIFICATION WE SEE THAT THIS PARTICULAR INMATE IS OF A GANG AFFILIATION THAT HE'S HOUSED WITH SOMEBODY THAT'S A TOTAL OPPOSITE, IF HE HASN'T BEEN BROUGHT TO THE ATTENTION OF STAFF TO BE MOVED OUT OF THAT PARTICULAR HOUSE BEFORE CLASSIFICATION, CLASSIFICATION WILL STRONGLY RECOMMEND THAT THEY BE MOVED. BUT IF THEY'RE GETTING ALONG AND THEY ARE HAPPY, THEY'RE COMPATIBLE, WE DON'T MAKE A MOVE.

Q. OKAY. I UNDERSTAND THE GANG AFFILIATION CONCERN. I UNDERSTAND THE AGE CONCERN. WHY AS A PRACTICE DO YOU PUT A BLACK WITH A BLACK AND A WHITE WITH A WHITE?

A. OR A HISPANIC WITH A HISPANIC.

Q. OR A HISPANIC WITH A HISPANIC.

A. MY WHOLE CAREER WE'VE DONE THAT. MY WHOLE ENTIRE 24 YEARS WITH THE DEPARTMENT IT IS WHAT THE DEPARTMENT HAS DONE.

WE HAVE IN THE PAST, AND VERY RECENT PAST, HOUSED A HISPANIC INMATE WITH A BLACK

INMATE. AND THE ONLY REASON WE DID THAT WAS BECAUSE THE INMATES REQUESTED IT. THE HISPANIC INMATE WAS RAISED WITH CRIPS, A BLACK GANG. THIS INMATE WAS AN INMATE OF THE 99TH STREET MAFIA CRIPS. HE WAS NOT COMFORTABLE LIVING WITH HISPANICS AND HE MOVED IN WITH A BLACK INMATE AND IT WORKED.

BUT IN ANY OF MY EXPERIENCE IN THE DEPARTMENT, TO HOUSE A BLACK INMATE WITH A WHITE INMATE OR A BLACK INMATE

* * *

[24] THE CHAMBRAY SHIRT AND THE JEANS, THEY WILL IDENTIFY THEMSELVES BY THE WAY THEY CUT THEIR HAIR, BY -- ON THE FACILITY THAT I RAN, WE DISCOVERED THAT THEY WERE USING THE STATE PENS WITH THE COLOR ON THE TOP OF THE PEN. THAT'S A BLUE PEN IS A CRYPT. A RED ONE IS A BLOOD. THEY DISTINGUISH THEMSELVES. AND THE HOUSING UNIT STAFF CAN READILY IDENTIFY THEM JUST BY LOOKING AT THEM.

SOME INMATES WHEN THEY TAKE ALL THEIR PROPERTY AND THEY GO TO THAT CELL WHEN THEY'RE FIRST MOVING IN, THEY'LL IDENTIFY THAT PERSON AS AN ENEMY. THEY MAY NOT KNOW THAT ENEMY'S NAME, BUT THEY KNOW HIM BY FACE THAT HE CAN'T CELL WITH THAT PERSON. THEN STAFF IMMEDIATELY HAVE TO TAKE ACTION TO MOVE THAT PERSON TO ANOTHER YARD, AT

LEAST ANOTHER HOUSING UNIT. BUT IT'S THE INMATES THEMSELVES THAT HAVE MOVED THE DEPARTMENT IN THAT DIRECTION.

NORTHERN HISPANIC INMATES CANNOT EVEN COME TO A SOUTHERN INSTITUTION. WE IMMEDIATELY -- WHEN WE SEE THAT AN INMATE IS FROM CALIFORNIA AVENUE IN BAKERSFIELD AND ABOVE, IF THAT'S WHERE HE WAS BORN AND RAISED, HE CAN'T WALK THE YARD IN GENERAL POPULATION HERE. AND THE INMATE SAYS NOTHING TO STAFF. HISPANIC INMATES WON'T SAY ANYTHING. THE STAFF ARE RESPONSIBLE TO REVIEW THE FILE AND REALIZE THAT THIS INMATE CANNOT BE HOUSED HERE.

Q. WHEN YOU SAY HE CAN'T WALK THE YARD, WHY IS THAT?

* * *

[27] Q. SO TO THE BEST OF YOUR KNOWLEDGE IN THIS 25 YEARS YOU'VE BEEN WITH THE DEPARTMENT, THERE'S BEEN NO CHANGE IN TERMS OF INTEGRATION OF PRISONS IN TERMS OF THE DEPARTMENT'S POLICIES TOWARDS INTEGRATION?

A. TOWARDS CELLING, PUTTING INMATES IN CELLS, NO, THERE HAS NOT BEEN ANY CHANGE IN THE PRACTICE.

Q. HOW ABOUT ANY OTHER --

A. YES, THERE HAS BEEN A CHANGE. THERE HAS BEEN A CHANGE IN -- FOR EXAMPLE, CMF VACAVILLE IN THE '70S THE INMATES -- AGAIN, LIKE I SAID, IT'S A CULTURAL TYPE EVOLUTION PROCESS.

THE BLACK GUERILLA FAMILY, WHICH IS A BLACK INMATE FACTION, AT CMF RAN THE TRASH CREW. AND THAT MEANT THAT THEY WOULD TAKE A DUMPSTER, YOU KNOW, THROUGH THE ENTIRE LENGTH OF THE PRISON, WHICH IS BETTER THAN A QUARTER MILE, AND PICK UP ALL THE GARBAGE FROM THE HOUSING UNITS ALL THREE FLOORS OF THIS ENTIRE INSTITUTION.

THE ARYAN BROTHERHOOD OR THE BIKERS, HELL'S ANGLES, HAITIANS, INDIVIDUALS LIKE THAT, HAD CONTROL OF THE KITCHEN, AND SPECIFICALLY THE SCULLERY, WHICH IS WHERE A LOT OF WEAPONS WERE MANUFACTURED FROM. THEY HAD CONTROL OF THAT. THE HISPANIC INMATES HAD CONTROL OF THE LAUNDRY. EACH RACE HAD ITS OWN AREA THAT THEY COMPLETELY CONTROLLED.

WHEN WORK INCENTIVE CAME ON LINE IN THE [28] EARLY '80S, IT WAS NECESSARY AT THAT POINT, AND AFTER THE DEATH OF CORRECTIONAL OFFICER PATCH AT VACAVILLE, TO BREAK UP THESE CLICKS, SO TO SPEAK. AND EACH JOB ASSIGNMENT

THEN WAS SUPPOSED TO BE ETHNICALLY BALANCED. AND IT WAS VERY DIFFICULT TO DO BECAUSE THE INMATES ARE A STRONGHOLD CULTURALLY. AND IT STILL IS NOT POSSIBLE IN SOME AREAS TO BREAK, YOU KNOW, TO ETHNICALLY BALANCE ALL OF THE DIFFERENT AREAS. IT DEPENDS ON THE PRISON, THE POPULATION THAT'S MADE UP OF THE PRISON OR THE NEEDS OF THE INMATES.

Q. OKAY. SO THAT PROGRAM HAS BEEN PARTIALLY SUCCESSFUL, THEN?

A. YES.

Q. NOT COMPLETELY SUCCESSFUL?

A. YES, IT IS.

Q. AND THE ASPECTS OF IT, WHICH IN YOUR OPINION HAVE NOT BEEN SUCCESSFUL, WOULD BE ONE OF THE REASONS WHY CELL ASSIGNMENTS, INTEGRATION HAS NOT BEEN TAKEN ON?

A. TO MAKE A MOVE TO HOUSE WHITES WITH BLACKS, BLACKS WITH HISPANICS, YOU KNOW, ACROSS THE BOARD WOULD CAUSE GREAT PROBLEMS IN THIS INSTITUTION. IT WOULD CAUSE VIOLENCE. IT WOULD CAUSE US MORE PROBLEMS THAN IS EVEN IMAGINABLE BECAUSE OF THEIR STRONG FEELINGS ABOUT WHO THEY HAVE TO LIVE WITH AND WHO THEY HAVE TO SPEND AN

INORDINATE AMOUNT OF TIME IN SUCH A REALLY SMALL SPACE.

NOW, TO INTEGRATE IN THE JOB ASSIGNMENTS, TO

* * *

[32] Q. -- SERGEANT TO SERGEANT?

A. YES.

Q. BUT IT'S NEVER -- IF IT IS SOMEWHERE IN THIS MANUAL, IT'S NOT RELIED UPON; WOULD THAT BE CORRECT? I MEAN - -

A. UH-HUH.

Q. THAT WOULD BE CORRECT?

A. UH-HUH.

NOW, IN HOUSING INMATES IT ISN'T SET IN STONE THAT THIS HOUSE HERE, BED 217 UP AND DOWN IS A BLACK CELL OR A WHITE CELL OR A HISPANIC CELL BECAUSE OUR COUNT VARIES FROM, YOU KNOW, DAY TO DAY, WEEK TO WEEK, MONTH TO MONTH ON HOW MANY BLACK, HISPANIC, WHITE INMATES YOU HAVE.

AND WE HAVE INMATES THAT ARE CLASSIFIED AS "OTHERS." THESE ARE INMATES, FOR EXAMPLE,

FROM BELIZE OR CUBA. THEY LOOK BLACK, BUT THEY ARE NOT CLASSIFIED AS BLACKS WHEN THEY COME TO THE DEPARTMENT. THEY'RE CLASSIFIED AS "OTHERS."

Q. WHAT ABOUT ASIANS?

A. ASIANS ARE ALSO CLASSIFIED AS "OTHERS." AND WITH THE ASIAN POPULATION, THE CONTROL SERGEANTS HAVE TO BE MORE CAREFUL THAN THEY DO WITH BLACKS, WHITES, AND HISPANICS BECAUSE, FOR EXAMPLE, YOU CANNOT HOUSE A JAPANESE INMATE WITH A CHINESE INMATE. YOU CANNOT. THEY WILL KILL EACH OTHER. THEY WON'T EVEN TELL [33] YOU ABOUT IT. THEY WILL JUST DO IT. THE SAME WITH LAOTIANS, VIETNAMESE, CAMBODIANS, FILIPINOS. YOU HAVE TO BE VERY CAREFUL ABOUT HOUSING OTHER ASIANS WITH OTHER ASIANS. IT'S VERY CULTURALLY HEAVY.

Q. OKAY. DO YOU HAVE DORMS AT THIS PRISON?

A. WE HAVE TWO DORMS -- ACTUALLY, THREE DORMS. WE HAVE THE MINIMUM SUPPORT FACILITY THAT HOUSES 300 INMATES. AND WE HAVE THE B GYM, WHICH HOUSES BETWEEN 120 AND 150 INMATES AND THOSE ARE BASICALLY LEVEL ONES, LEVEL TWOS CLOSE TO BEING LEVEL ONES, MINIMUM -- I MEAN MSF -- NOT MSF -- THE COMMUNITY CORRECTIONAL FACILITY INMATES

THAT GET INTO TROUBLE COME TO THAT PARTICULAR GYM.

Q. HOW DO THE RACES -- HOW IS RACE USED IN THOSE DORMS IN TERMS OF SEPARATION?

A. THE WAY THE BEDS ARE LAID OUT, THEY HAVE DOUBLE BUNKS AND TRIPLE BUNKS. AND THE STACK WILL BE EITHER BLACK, WHITE, HISPANIC, OR BLACKS WITH OTHERS, WHITE WITH OTHERS, HISPANIC WITH OTHERS. YOU'LL HAVE A BLACK BED, A WHITE BED, AND A HISPANIC BED. THAT'S THE IDEAL SITUATION.

BUT BECAUSE OUR BLACK POPULATION IS HEAVIER THAN EITHER THE HISPANIC OR THE WHITE, IT'S POSSIBLE TO HAVE TWO BLACK BUNKS TOGETHER THAN A WHITE AND A HISPANIC.

Q. AND THOSE PEOPLE ARE ALL IN THE SAME GENERAL AREA BECAUSE THEY'RE LOWER SECURITY?

[34] A. YES.

Q. AND THEY DON'T HAVE THE SAME KIND OF RACIAL PROBLEMS THAT YOU WOULD IMAGINE THAT WOULD HAPPEN IN A CELL?

A. WE COULD NOT HOUSE A BLACK INMATE AND PUT A WHITE INMATE ON TOP OF HIM.

Q. WHY?

A. THAT WOULD CAUSE PROBLEMS. THAT WOULD CAUSE A LOT OF PROBLEMS.

Q. BUT THEY CAN BE RIGHT NEXT TO EACH OTHER?

A. THEY CAN BE NEXT TO EACH OTHER, BUT THEY CANNOT BE ON TOP OF EACH OTHER.

Q. AND --

A. IT WOULD CAUSE A FIGHT RIGHT ON THE SPOT.

Q. AND HOW DO YOU KNOW THIS?

A. IT'S HAPPENED.

Q. YOU HAVE DONE -- IN YOUR EXPERIENCE?

A. YES.

MISTAKES HAVE BEEN MADE. THAT WOULD BE TITLED A GRIEVOUS ERROR ON THE PART OF A CONTROL SERGEANT TO DO SOMETHING LIKE THAT.

Q. HAS THAT HAPPENED IN YOUR EXPERIENCE AT THIS PRISON?

A. NOT AT THIS PRISON, BUT AT CCI IT HAS.

Appendix H

Q. CCI. WHERE IS CCI?

[35] A. TEHACHAPI, UP THE HILL.

Q. AND WOULD THERE BE A REPORT OF THE GRIEVOUS ERROR IN THAT SITUATION?

A. PROBABLY A 115 ON BOTH OF THE INMATES FOR FIGHTING, BUT I'M NOT SURE IF A CONTROL SERGEANT WAS DOCUMENTED. IF ANYTHING IT WOULD HAVE BEEN A LETTER OF CONTACT, WHICH ONLY LASTS IN THE SUPERVISORY FILE FOR 90 DAYS.

Q. OKAY. IS IT -- IS THIS PROCEDURE --

A. PRACTICE.

Q. IS THIS PRACTICE WRITTEN DOWN?

A. I DON'T BELIEVE SO. I HAVE NEVER SEEN IT WRITTEN. DOWN.

AND THE REASON I SAY THAT IS BECAUSE I HAD AN OCCASION WHERE I FELT A CONTROL SERGEANT WAS NOT PERFORMING TO MY EXPECTATIONS. AND WHEN I TRIED TO DOCUMENT THE CONTROL SERGEANT REGARDING, YOU KNOW, POLICY AND PROCEDURE, AND IT'S NOT RELATED TO HOUSING INMATES, I FOUND THAT THERE WERE NO PROCEDURES IN WRITING FOR CONTROL SPECIFICALLY.

Appendix H

WE NOW HAVE POST ORDERS WHICH DEFINE TO THE SERGEANT HOW TO DO COUNTS, HOW TO DO RADIO CHECKS, ELECTRICAL CURTAILING, YOU KNOW, THE NUTS AND BOLTS OF THE JOB, BUT NOT REGARDING HOUSING.

Q. OKAY. I'M NOT -- I UNDERSTAND YOUR ANSWER, BUT . . .

* * *

[38] Q. JUST BY BUNK?

A. JUST BY BUNK.

Q. YOU'VE ALREADY TOLD ME A LITTLE BIT ABOUT THE PRACTICE FOR ASSIGNING BED ASSIGNMENTS. I'D LIKE FOR YOU JUST TO GIVE ME A LITTLE MORE DETAIL AND JUST GO THROUGH SORT OF A CHRONOLOGY OF FROM THE TIME THEY GET OFF THE BUS TO THE TIME THAT THEY'RE -- IF THEY'RE GOING TO BE HERE LET'S SAY FIVE YEARS, WHAT'S THE CHRONOLOGY FROM THE TIME THEY GET OFF THE BUS TO THE TIME THEY GET TO THE BED THEY'RE PRETTY MUCH GOING TO STAY IN IF THEY DON'T HAVE A PROBLEM?

A. THE CONTROL GETS A LIST FROM THE R & R SERGEANT, WHICH IS THE CDC-135. AND THE 135 LISTS THE INMATE'S NAME, RACE, AND CUSTODY. ALSO IT WILL LIST IF THAT INMATE HAS A SPECIALIZED PROGRAM NEED, FOR EXAMPLE

EOP ENHANCED OUTPATIENT, MENTAL -- YOU KNOW, THEY HAVE SOME MENTAL PROBLEMS AND THEY NEED TO GO TO THAT PARTICULAR PROGRAM, WHICH IS ALSO ON FACILITY D. IT'S VERY SIMPLE TO HOUSE THOSE PARTICULAR INMATES THAT ARE ALREADY EARMARKED FOR SPECIAL PROGRAMS. WE KNOW WHAT HOUSING UNIT THEY GO TO.

THEN WHAT THE CONTROL SERGEANT NEEDS TO DO IS LOOK AT WHAT KIND OF EMPTY BEDS ARE AVAILABLE ON BRAVO YARD, PARTICULARLY HOUSING UNIT B-1, WHICH IS THE ORIENTATION UNIT. THE ORIENTATION UNIT HOUSES ALL OF THE INMATES THAT COME, YOU KNOW, TO THE INSTITUTION FOR [39] GENERAL POPULATION. THEY ARE SEEN BY THE COMMITTEE WITHIN 10 DAYS, 14 DAYS OF THEIR ARRIVAL.

AND AT THAT POINT THE CC-1, CORRECTIONAL COUNSELOR 1, CAN INDICATE ON -- IT'S A REGULAR SHEET THAT GIVES THE HOUSING UNIT SERGEANTS THE NAME, NUMBER, AND RACE OF THE INMATE. AND IF THERE'S A PARTICULAR FACTION, GANG FACTION, THEN THEY WILL ALSO PUT THAT THERE ON THE SIDE SO THAT THE SERGEANT HAS A CLUE AS TO WHAT GANG AFFILIATION THIS INMATE HAS. IF THEY'RE NONAFFILIATED, THEY PUT NA, OF COURSE.

THEN THE BRAVO UNIT SERGEANT HAS TO MAKE SOME PHONE CALLS AND HE HAS TO PRESENT THESE INMATES TO MOVE THEM OUT OF

ORIENTATION AND THEY HAVE TO MOVE TO MAKE ROOM FOR MORE INMATES COMING IN.

Q. LET ME INTERRUPT FOR A SECOND. HOW IS THEIR BED IN THE ORIENTATION UNIT DETERMINED?

A. IF THERE IS AN EMPTY CELL AND TWO INMATES OF THE SAME RACE CAME IN AT THE SAME TIME, AND THEY APPEAR TO BE COMPATIBLE IN R & R, SAY THEY'RE IN THE SAME TANK, THERE ISN'T A FIGHT, THEN IT'S -- THEY NORMALLY GET HOUSED TOGETHER.

Q. WHAT IF THERE IS AN ODD NUMBER? I MEAN, IF THERE'S THREE BLACKS, A WHITE, AND A HISPANIC, WHERE WOULD THOSE FIVE -- HOW WOULD THOSE FIVE -- OR IF THERE WERE THREE BLACKS, TWO WHITES, AND A HISPANIC, HOW WOULD THEY . . .

* * * *

Appendix H

EXHIBIT D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV-95-01192
CBM (BOR)

GARRISON S. JOHNSON, an individual,

Plaintiff,

vs.

STATE OF CALIFORNIA; JAMES H. GOMEZ, an individual; JAMES ROWLAND, an individual; and DOES 1 through 20, inclusive,

Defendants.

Friday, March 2, 2001

Deposition of

STEVEN CAMBRA

* * *

Appendix H

[commencing at page 28] general population Level 4 and there was a Level 1.

THE COURT REPORTER: I am sorry. There was a psych services unit --

THE WITNESS: General population Level 4 -- psych services unit, general population unit Level 4 and a minimum security unit. So it would depend on the institution -- admission to the institution, and what have you.

Q. Okay. How -- what factors are taken into consideration when -- once it's determined which -- whether -- you know, you mentioned these different areas, Level 3 security, Level 4 security, psych, all these different areas. Once a determination has been made as to which one of these -- I am going to call them areas -- the prisoner is going to, what factors are taken into consideration in determining who -- who his or her cellmate is going to be?

A. The -- the area lieutenant, typically, of that area or the sergeant in that area, depending on, you know, how the facility is set up, would try to make a determination and place people in the cell that were -- that they determined to be compatible as best they could by case factors, maybe by talking to the individuals, and what have you.

Q. Okay. Can you be more specific in terms of . . .

* * *

[29] what -- what you mean by case factors or what -- sort of what the factors are? What -- what is your knowledge as to what the factors are?

A. Well, what I would do, you know, is I consider their ethnicity, I consider their, you know, custody. I would probably talk to the folks, and, you know, I try to consider age a little bit, you know. But the real goal is try to get compatible cell partners.

Q. Okay.

A. I mean, that's pretty straightforward.

Q. The -- the first factor that you mentioned was ethnicity. Can you explain a little bit about why you would take ethnicity into consideration?

A. Well, I don't want to be charged with setting inmates up to be injured, and in the prison society, if I -- if I just take two inmates and have total disregard for their ethnicity and say, "Okay. You're white and you're black. I am going to put you into this cell together. Have a nice day," I feel I am putting myself in a position that I could be charged with setting up one of them to be injured, because in our prison society, inmates tend to associate along ethnic lines and along their -- their own race. So I think that would be very unprudent, unless they came to me and they told me, "Hey, we want to be in the cell together," and then I've got to figure out . . .

* * *

[32] the cell decision was okay.

Q. Okay.

A. I mean, we are talking about cell decisions right now.

Q. Right. That's exactly what we're talking about.

So did that cell decision last? I mean, was it -- did it have to be changed because of the tension, or did it -- was it okay?

A. From what I recall -- I mean, again it's been a long time since I have been involved in the individual cell decision, but the decision at San Quentin with the black inmate that was an EME worked fine. They went out to the -- they had group exercise yards in the security housing unit when the inmates in the security housing unit were housed in San Quentin back in those years, and -- and the inmate did fine on the yard. The inmate did fine in the cell.

Q. Okay. On the opposite end of the spectrum, have -- to the best of your knowledge, have there ever been any situations where two inmates of two different races were celled together and problems resulted because of it?

Do you understand my question?

A. Yeah, I hear you. You are coming at it from the other end?

Appendix H

Q. Yeah.

* * *

[34] dealing with a white being put with a black, or a white being put with a Mexican, or some interracial housing decision, that you would have heard about it?

A. Well, we receive all incident reports, so if it was -- if it was an assault, you know -- in other words, if it was a crime that resulted in some injury, yes.

Q. Okay.

A. If it was, you know, a situation where people became incompatible and begged to get out of the cell, and the local staff took them out, no.

MR. HILGER: Okay. I need to take a quick break. Go off the record.

(Recess taken.)

THE WITNESS: Are we back on the record?

May I clarify one thing --

Q. BY MR. HILGER: Sure.

A. -- I just thought of?

Appendix H

At San Quentin, I mentioned a back inmate that came to San Quentin that was in the EME prison gang, and I had forgotten that when I was there, the Toussaint injunction was in force and they mandated --

THE COURT REPORTER: I am sorry. I had forgotten, when I was there --

THE WITNESS: Okay. I had forgotten, when I was there, the Toussaint injunction was in force, and that . . .

* * *

[36] but the Hispanic inmates tend to ally north and south, and they tend to be at odds with each other.

So, again, if I were to just discount the inmates -- if I were to discount that fact and take an Hispanic inmate from Southern California without any regard or talking to the individual, house him with an Hispanic inmate from Northern California and put them in a cell, then the inmates, knowing how our society works and knowing that I know it, then they would see that as a setup also.

Q. Okay. Have there been -- again, with this question of the inmates complaining about a setup, have there been incidents of inmates complaining of racial setups within your years within --

MS. TURNER: The only question I have is do you mean in the cells or in the yards or in the --

MR. HILGER: In the cells.

Q. I am specifically talking about the cells where -- where you said -- you told me if a warden, or if a, you know, watch commander decided to put a Mexican and an Asian in the same cell, that he could be accused of trying to set up problems. I mean, I gave those ethnicity examples, but -- I think you said a white and a black -- that you could be accused -- he or she could be accused of, you know, setting up a fight, basically.

Have there been such incidents? And then I also [37] asked you if there had been any, you know, violence resulting from such a decision, and I think you said to the best of your knowledge, no. But I'm asking you now if there have been letters -- you said the letters would fly -- if there have been situations where such a determination was made and letters flew.

A. By ethnicity?

Q. Uh-huh.

A. I can't recall it.

Q. Okay. Briefly, going back to this Form 135, Warden Schulteis told me that this is, again, what is used when people get off the bus to determine where they're going to go initially. It includes ethnicity, but it doesn't include gang affiliation. It does have a space for coaments, however. Would gang affiliation be listed under comments, most likely?

A. Sure.

Q. Okay. What are the chances in general of -- of a white inmate being celled with a black inmate on initial placement? Would it be zero percent?

A. Pretty close to it.

Q. Okay.

MS. TURNER: The only objection I am going to make is are you -- you know, are you asking about for every prison including some of the women's facilities, I mean, if

[39] I guess basically what I am asking is, Is it ever likely that someone would not necessarily be housed with someone of their same race on initial placement in a situation?

A. No. That would be the practice.

Q. Okay. And that practice is not part of the -- this paper that I haven't seen, the '98 memo? Is that mentioned in there at all? Is race mentioned in this practice -- I mean, in this memo? I'm sorry.

A. I don't believe so. We have to get the memo.

Q. Okay.

A. And we will do so. It -- I believe it speaks to compatibility for sure.

Q. Okay.

A. And it -- and it speaks to exceptions.

Appendix H

Q. Okay.

A. So we best let the memo speak for itself.

Q. Okay. But if the memo doesn't mention race, is it fair to say that the department has an unwritten practice of not celling -- strike that.

Is it safe to say that the department has an unwritten practice of always attempting to place an inmate with a cellmate of their same race?

MS. TURNER: Upon initial placement, you mean?

MR. HILGER: Upon initial placement.

* * *

[51] over my career, it's -- the oversight in that regard definitely has increased --

Q. Okay.

A. -- from what it was in 1970, 1971.

THE COURT REPORTER: From what it was when?

THE WITNESS: 1970, '71.

MR. HILGER: I'm sorry for interrupting.

Appendix H

Q. Based on your testimony, then, there was no specific incident or incidents that led to the increased monitoring. It was just gradually over time?

A. Well, I probably wasn't in a management position then, because it was -- you know, it's been the way it's been for quite a while, so -- so I -- you know, I am sure some enlightened administrator decided that we had to pay more attention to this, maybe because of what they saw out there, but I don't know who the enlightened administrator was or whether it was a bunch of people or what.

Q. Why, then -- if the CDC has an anti segregation policy and is interested in helping the prisoners to eliminate their own racial hatred, why, then, does the department continue to condone; you know, not putting someone of one race with someone of another race in -- in the cells, particularly in light of the fact that you are not aware of any incidents of violence that have occurred based on such a decision? Why doesn't the department begin [52] to do this?

MS. TURNER: Okay. The only objection I am going to make is that kind of misstates his testimony, because he has talked about the compatibility --

MR. HILGER: Okay.

MS. TURNER: -- goal, and then you are talking about --

MR. HILGER: Let me -- I will rephrase.

MS. TURNER: -- you are talking about the initial placement day one.

MR. HILGER: Yeah.

Q. I am talking about the initial placement, the fact that there's a less than a 1 percent chance that if I am going in as a white person, that I am going to be celled with a black person. Why, if the prison is interested in -- in the things that I mentioned, why--does that unwritten practice continue?

A. I would answer that by saying that in the areas on the yard and the work areas, and what have you, the staff have much better visibility and observation in those areas to intercede if there is a problem, as opposed to that cell. It is two individuals, door closed. Out of sight, out of mind. And -- and that's a pretty risky situation, unless the inmates, again, agree to do so.

So I -- I interpret your question as forced, very . . .

* * * *

STATE OF CALIFORNIA

TRANSFER RECORD

CDC 136 (1/91)

DEPARTMENT OF CORRECTIONS

DATE:

TO: (NAME OF RECEIVING INSTITUTION)

ATTENTION:
RECORDS OFFICER

The following identified persons will be transferred this date.

FROM:

TO:

NUMBER	NAME	LEVEL	RTH	COMMENTS

SIGNATURE	TITLE	SENDING INSTITUTION

Receipt of the above-named persons and their records is acknowledged.

SIGNATURE OF TRANSPORTING OFFICER	TITLE	INSTITUTION
SIGNATURE OF RECEIVING OFFICER	TITLE	INSTITUTION

BEST AVAILABLE COPY

APPENDIX I — DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT DATED APRIL 9, 2001

[Cover and Tables of Contents and Authorities Intentionally Omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION

Case: CV-95-01192 CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

Appendix 1

This is an action brought pursuant to 42 U.S.C. § 1983. Plaintiff, Garrison S. Johnson, a state prisoner incarcerated at the California State Prison for Los Angeles County located in Lancaster, California ("CSP-Lancaster"), contends that there has been "invidious discrimination" by the State of California Department of Corrections, its former Directors, James H. Gomez and James Rowland," alleging they are liable for "formulating and implementing a policy and practice of housing inmates based solely on their race." (Fourth Amended Compl., ¶ 1.) Plaintiff contends that this policy has "escalated racial tensions in the prison population, fostered violence and distrust among the prison inmate, and created conditions which have subjected plaintiff to duress, oppressions, and other cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution." (*Id.*) Plaintiff also claims a violation of his equal protection rights under the Fourteenth Amendment. (*Id.*) Plaintiff seeks damages and injunctive relief.

Defendants contend that they do not "hous[e] inmates solely on the basis of race." In making housing assignments, the Department of Corrections must look at many factors to make cell assignments. Once having completed the temporary reception center process, the policy of the California Department of Corrections is to permit inmates to find, from among the population, an inmate with whom they are compatible and then the CDC accommodates their requests be housed together.

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STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiff is a prisoner in the custody of the California Department of Corrections (the "CDC"). (4th Am. Compl., ¶ 2.)

2. Plaintiff was sentenced to state prison on June 17, 1987, by the Superior Court of the California, County of Los Angeles, for twenty-five years to life in state prison for one count of violation of Penal Code § 187 (murder). Plaintiff also received an additional eleven year consecutive term for four counts of violation of Pen. Code § 213.5 (residential robbery) and one count of violation of Pen. Code § 245(a)(1) (assault with a deadly weapon). (Exh. 1, which is attached to the Declaration of Sara Turner.)

3. Plaintiff was received at the California Institution for Men on June 22, 1997. (Exh. 2.)

4. Plaintiff's classification summary was prepared on July 20, 1987. (Exh. 3.) The document makes no reference to Plaintiff's race. (*Id.*)

5. Defendants Rowland and Gomez are former Directors of the CDC. (Answer, ¶ 4.)

6. Defendant Steven Cambra, sued in his official capacity, is the Acting Director of the CDC. (Declaration of Steven Cambra, hereinafter, Exh. 4, ¶ 1.)[1]

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1. The Department of Corrections has been dismissed by Plaintiff. Defendant S. Cambra, the current Director of the CDC is named in his official capacity. See Rule 25 of the Fed. R. Civ. P.

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7. Plaintiff never had any personal contact with Defendant, Mr. Rowland or Mr. Gomez. (Plaintiff Garrison Johnson's Deposition, attached to Notice of Lodgement, filed and served herewith, page 20: 19-21:9).

8. Inmates are housed double-celled (two inmates per cell) or in dormitories. (Exh. 4, ¶ 4.)

9. Plaintiff's custody level does not qualify him for dormitory housing. (Pl's Dep., p. 44: 20-45: 6.)

10. Plaintiff is housed in a two-man cell at CSP-Lancaster. (Compl., ¶ 9.)

11. Plaintiff's cell-mate is Mr. Stubbs. (Pl's. Dep., p. 18:25-19:1.) Plaintiff cells with Mr. Stubbs because Plaintiff finds they are compatible. (*Id.* at, pp. 19: 10-20: 6.)

12. If Plaintiff found he was compatible with someone of a different race and wanted to house with that person, he could.[2] (Pl's Dep., p. 25: 11-18.)

13. An initial housing decision is one that is made as soon as the inmate arrives at the institution after being sentenced. This initial housing institution is called a reception center. Upon an inmate's arrival to a reception center, particularly if he has never been housed in any CDC facility, CDC has only limited information about the inmate. The inmate then goes through a classification process. It is during this process that an evaluation is done as to the

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2. By his deposition testimony, Plaintiff's statement that "he could" appears to be in the context that he would be agreeable to it. (See Plaintiff's Dep., p. 25: 11-13.)

inmate's physical, mental and emotional health. Also discussed during this time are vocational and educational goals, and the inmate is given a battery of tests. (Exh. 4, ¶ 5.)

14. The inmate's history in jail and any previous commitments are reviewed to begin to determine his security needs and classification level. The inmate is also given written documentation and orientation materials. Also, if an inmate has a disability, CDC evaluates his needs with respect to that disability. CDC looks at whether or not the inmate has enemies in the prison, such as people who testified against him in the past or in his criminal case, co-defendants, inmates with whom he may have had disputes with during previous prison placements. (Exh. 4, ¶ 6.)

15. With respect to initial double-cell housing placement, CDC looks at several factors. These include, but are not limited to, gender, age, classification score, case concerns, custody concerns, mental and physical health, enemy situations, gang affiliation, background, history and custody designation. (Exh. 4, ¶ 7.)

16. In addition to the factors identified above, race is considered during the initial double-cell housing classification decision. (Exh. 4, ¶ 8.)

17. The reason race is a consideration in an initial housing decision is that, based on CDC's experience, CDC finds that prisoners make this out to be an important issue. The reason CDC has found that inmates believe race to be an important issue stems from the identification that

prisoners, particularly male prisoners, make of themselves. The second reason CDC finds that male prisoners make this out to be an important issue stems from the gang involvement that is a part of many of the inmates' backgrounds and is generally found to play a role in those inmates' anti-social, criminal behavior. (Exh. 4, ¶ 9.)

18. Therefore, when an inmate arrives at a CDC facility, if not required to be single-celled or able to be housed in a dormitory, he is generally initially, housed double-celled with an inmate of his own ethnic race. If the inmates indicate they are not able to get along with their cellmate, then prison officials evaluate this complaint and either continue their housing situation or house them with someone else. (Exh. 4, ¶ 10.)

19. If any inmate feels that his housing situation or cellmate poses a danger to his safety, then he is rehoused. (Exh. 4, ¶ 11.)

20. After the orientation period (which typically takes around 60 days), the inmate is either retained at the institution as his permanent housing or is transferred to the institution where the classification representatives determine he would be most suited. If he is to be housed at another institution, then the inmate will go through a housing screening process. In fact, every time an inmate is transferred, his housing and status requirements are evaluated prior to cell placement. (Exh. 4, ¶ 12.)

21. Plaintiff transferred to CSP-Lancaster on March 15, 1994. (Exh. 2.)

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22. At CSP-Lancaster, with respect to the initial housing, if the inmate will be housed in a double-cell, the initial housing is generally done by housing an inmate with another inmate of his same ethnic race. In addition, at CSP-Lancaster, administrators look at any prison or street gang affiliation and make every attempt not to house inmates with members of what could be considered a rival gang or rival disruptive group. (Declaration of L. Schulteis, Associate Warden, CSP-Lancaster, hereinafter, Exh. 5, ¶ 5.)

23. At CSP-Lancaster, prison officials also try to house an inmate with an inmate close to his own age. Also, for example, prison officials attempt to assign non-smokers with non-smokers, and vice versa to alleviate complaints about smoking odors on property or clothing. Prison officials also consider other factors such as enemy concerns, custody level and classification. (Exh. 5, ¶ 6.)

24. At CSP-Lancaster, prison officials make housing decisions in the manner described above because they find that it will be the least likely to lead to conflict among the prisoners within their respective individual housing unit (cell) as well as resulting in the least amount of conflict among the prisoners when they are all out together on the yard. (Exh. 5, ¶ 7.)

25. With respect to those inmates that qualify to live in dormitory housing, inmates of all races are housed together. Prison officials attempt to balance the number of inmates within each race in the dormitories in order to avoid the possibility of racially based conflict, which has occurred in the past. (Exh. 5, ¶ 8.)

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26. As to jobs, meals, yard and recreation time, vocational and educational assignments, inmates from all races participate together. (Exh. 5, ¶ 9.)

27. As to the initial housing assignment, if prison officials at CSP-Lancaster were not to consider race and gang affiliation in the initial double-cell housing decision, there will be conflicts both in the cells and the conflict will flow onto the yards. Although prison officials would prefer the inmate population not focus on these areas in a manner leading to conflict, prison officials find that the inmates do place a weight on the issue. The reason is because of the manner in which prison inmates identify themselves both before and after they have been sent to prison and because inmates spend very long hours in small cells. (Exh. 5, ¶ 10.)

28. At CSP-Lancaster, if prison officials we were to disregard the initial housing placement being done in the manner set forth above, then it is there certainly would be serious violence among inmates. (Exh. 5, ¶ 11.)

29. Prison officials making initial housing decisions at CSP-Lancaster would not knowingly disregard the factors and place an inmate into jeopardy and would not compromise an inmate or group of inmates' safety by taking steps that they know would result in violence and conflict. As it is a duty of prison officials to preserve the safety and security of the institution, inmates, and staff, and having been given that responsibility, staff would therefore not ignore a known issue impacting safety. (See Exh. 5, ¶ 12.)

30. After an inmate leaves the reception center and goes into the prison where he will be permanently housed, double-celled inmates are able to select their own cellmates. The inmate indicates on a designated form the inmate with whom he would like to be housed. The inmate with whom he would like to be housed initiates a similar signed request. Unless barred by any other reason, the selection is granted. An inmate may house with someone from his own race or from another race. (Exh. 5, ¶ 13.)

31. Plaintiff was formerly a member of the "Crip" gang. (Pl's Depo., p. 27: 16-24; see also Exh. 3.)

32. Plaintiff appropriately receives meals (Pl's Depo., p. 31: 1:7 and 32: 6-7), medical and mental health care (*Id.*, p. 32: 9-10 and 15-17), shelter (p. 33: 1-4), exercise, sanitation and showers (*Id.*, p. 33: 5-15).

33. Plaintiff has never made a request to cell with a person of a different race. (*Id.*, p. 39: 2-5.)

34. Prior to filing the lawsuit Plaintiff never mentioned to prisoner officials that he wanted to live with somebody of a different race. (*Id.*, p. 45: 9-14.) Plaintiff never filed an inmate appeal on the issues raised in his complaint. (*Id.*, p. 45: 17-18.)

35. Despite Plaintiff's belief, at no institution is "race" the "sole factor" in a housing decision. (Exh. 4, Cambra Decl., ¶ 13.) If race were to be disregarded entirely, however, there will be problems within the individual cells. These will be problems that the staff will have a difficult time in

controlling. There will be fights in the cells and the problems will emanate onto the prison yards. Prison housing staff are not adequately able to deal with the problems that could arise. The cells are small, confined areas and staff cannot see into the cells without going up to them and looking inside. Inmates are capable of placing coverings over the cell windows and then staff cannot see inside at all. Inmates are confined to the cells for numerous, continuous hours. Because there are limited staff to oversee numerous cells, it would be very difficult to assist inmates if the staff were needed in several places at one time. Also, there would be an additional risk to prison employees as staff members would be accused of "setting an inmate up" if a fight resulting in harm were to break out inside of a cell. (*Id.*)

36. Plaintiff, as a prisoner, agrees there is racial tension in the prison. (Pl's. Depo., p. 35: 2-4:)

37. Plaintiff contends he was transferred from a prison prior to a racial riot breaking out. Specifically, he states [referring to Calipatria State Prison]: "[i]f I would have stayed there, I would have been involved in that because you have four facilities there and each facility went on a major riot and a lot of people got hurt and injured just based on your skin color. I'm Black, and if I was there I would been hurt." (*Id.*, p. 35: 15-23.)

38. Plaintiff says that racial riots occur at CSP-Lancaster. (*Id.*, p. 36: 14-19.)

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ARGUMENT

I.

SUMMARY JUDGMENT SHOULD BE GRANTED FOR DEFENDANTS

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where it is demonstrated that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Avila v. Traveler's Insurance Co.*, 651 F.2d 658, 660 (9th Cir. 1981). While the burden of proof rests on the moving party, *Belt Travel Service, Inc. v. International Air Transport Assoc.*, 620 F.2d 1360, 1364 (9th Cir. 1980), the opposing party must contradict any factual assertions in movants' affidavits or they will be accepted as true. *Avila* at 660. The burden of producing evidence sufficient to negate a motion for summary judgment rests upon the party having the burden of proof at trial, in this case, the Plaintiff. Absent such a showing, the "moving party is 'entitled to judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In a civil rights action, the Plaintiff must demonstrate the deprivation of a federally protected right. *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1446 (9th Cir. 1986); *Havas v. Thornton*, 609 F.2d 372, 374 (9th Cir. 1979). Where there is no allegation of facts which show the violation of a federally protected right, Defendants are entitled to prevail

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as a matter of law. *Baker v. McCollan*, 443 U.S. 137, 140 (1979). The moving party is not required to produce evidence showing the absence of genuine issues of material fact on issues for which the non-moving party has the burden of proof. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 885 (1990); *United Steelworkers v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542 (9th Cir.1989).

Based on the facts and evidence in this case, Plaintiff will be unable to show that Defendants have or are violating his constitutional rights.

II.

PLAINTIFF DOES NOT DEMONSTRATE AN ESSENTIAL ELEMENT OF STANDING

As a preliminary matter to all actions brought in federal court, a Plaintiff must demonstrate that he has standing. The "doctrine of standing" is a constitutional principle that prevents courts of law from undertaking tasks assigned to political branches. *Lewis v. Casey*, 518 U.S. 343, 349 (4th Cir. 1999). This doctrine is jurisdictional, and not subject to waiver. (*Id. at* fn. 1.) *See also United States v. Hays*, 515 U.S. 737, 742 (1995).

Lewis clarifies the standing requirements for a constitutional challenge by reminding the Court that "the Constitution requires a plaintiff to demonstrate actual injury in order to have a federal court adjudicate a claim and allows no exception prison-conditions cases." *Lewis*, 518 U.S. at 349-352. The Court explained that the requirement that an

inmate show "actual injury" derives from the constitutional principle of standing. *Lewis*, 518 U.S. at 349. If a claimant does not have standing, he is barred from bringing suit and the federal court is without jurisdiction to hear the claim. *See Allen v. Wright*, 468 U.S. 737, 750-52 (1984). "It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey*, 518 U.S. at p. 349. Further holding that, "it is not the role of courts, but that of political branches, to shape institutions of government in such fashion as to comply with the laws and the constitution." (Id.); *see also Raines v. Byrd*, 521 U.S. 811, 818 (1997) (standing requires a legally and judicially cognizable injury).

Therefore, because a Plaintiff bears the burden of supporting each element of standing "in the same as any other matter on which the plaintiff bears the burden of proof . . ." (*Lewis v. Casey*, 518 U.S. at 358), the issue of actual injury to the Plaintiff must be resolved.

In this case, Plaintiff does not demonstrate how he has or will be harmed by any actions of the Defendants. Plaintiff does not indicate that, because of his race, he has received any lesser or greater privileges or benefits than any other inmate.[3] Plaintiff admits he receives the minimal necessities

3. When questioned at his deposition, Plaintiff departed dramatically from the complaint and stated that he considers it a "privilege" to be able to house with an inmate of his own race. (Pl's Depo., page 48:1-25). When pressed with questions from by his own attorney, Plaintiff clarified that he believes privileges are a "bad thing." (Pl's. Depo, at page 58.) He goes on to clarify when

(Cont'd)

guaranteed to prisoners under the Eighth Amendment. (Undisp. Fact # 32.) Plaintiff admits he never made a request to cell with an inmate of another race and therefore a request was never denied. (See Undisp. Facts #'s 33 and 34.) Plaintiff does not demonstrate "actual injury." Without this actual injury, the Plaintiff has no Article III standing under *Lewis*. For these reasons, the Complaint should be dismissed.

III.

PLAINTIFF HAS FAILED TO DEMONSTRATE A VIOLATION OF HIS EIGHTH AMENDMENT RIGHTS BY DEFENDANTS GOMEZ AND ROWLAND

Plaintiff contends that the former directors of the California Department of Corrections, Defendants Gomez and Rowland, violated his Eighth Amendment Rights. (4th Am. Compl., First Claim for Relief.)

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Under the Eighth Amendment, prison officials have a duty to "provide humane conditions of confinement . . . , [to] ensure that inmates receive adequate food, clothing, shelter and medical care, and [to] 'take reasonable measures

(Cont'd)

questioned about his understanding of privileges, that he thinks they are both "good" and "bad." (Pl's. Depo, page 59: 1-28) A possible explanation for this is that Plaintiff's classification score shows him to have a lower than average I.Q. (See Exh. 3.)

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to guarantee the safety of the inmates . . .'" *Farmer v. Brennan*, 511 U.S. 825, 831 (1994).

To constitute the "unnecessary and wanton infliction of pain" necessary for an Eighth Amendment violation in the prison context, the United States Supreme Court requires that both an objective and subjective component of the Eighth Amendment be satisfied. *Wilson v. Seiter*, 501 U.S. 294 (1991). First, the deprivation complained of must be sufficiently serious by objective standards. *Wilson* at 297. A deprivation is sufficiently serious if it denies "'the minimal civilized measure of life's necessities.'" *Wilson*, at 297 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). Specifically, the core areas protected by the Eighth amendment are food, clothing, shelter, sanitation, medical care and personal safety. *Hoptowit v. Ray*, 682 F.2d 1237, 1246 (9th Cir. 1982). The Constitution does not mandate comfortable prisons and only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation. *Rhodes v. Chapman*, 452 U.S. at 347-349. Here, Plaintiff admits he has received all of the minimal necessities. Plaintiff contends he receives meals (Plaintiff's Deposition, p. 31: 1:7 and 32: 6-7), medical and mental health care (Plaintiff's Depo., p. 32: 9-10 and 15-17), shelter (p. 33: 1-4), exercise, sanitation and showers (p. 33: 5-15). As to his individual housing situation, Plaintiff selected his cellmate and is housed with an inmate with whom he claims he is compatible. (Undisp. Fact # 11.) Without even reaching the subjective standard, Plaintiff's claims do not rise to a Eighth Amendment constitutional violation.

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In addition to this objective standard, courts have required a Plaintiff to establish that Defendants acted with "deliberate indifference" to Plaintiff's needs. *Anderson v. County of Kern*, 45 F.3d 1310, 1313, amended by, 75 F.3d 448 (9th Cir.), cert. denied, 516 U.S. 916 (1995). In the Eighth Amendment context, the Supreme Court has interpreted this standard to require that an official subjectively "knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. Here, Plaintiff does not demonstrate that Defendants knew of and disregarded an excessive risk to his health and safety. In fact, Plaintiff never made his needs known to the Defendants.

Third, Plaintiff admits he had no personal involvement with the Defendants. (Undisp. Fact # 7.) To the extent Plaintiff is attempting to sue them in a supervisory capacity because of the conduct of unknown employee, he cannot. Supervisory personnel are not liable under 42 U.S.C. § 1983 for the actions of their subordinates under a theory of respondeat superior and, therefore, when a named Defendant holds a supervisorial position, the causal link between them and the claimed constitutional violation must be specifically alleged. *See, Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1978); *Mosher v. Saalfeld*, 589 F.2d 438, 441 (9th Cir. 1978). The Civil Rights Act does not establish a basis for liability, vicarious or otherwise, against persons who do not participate in a civil rights violation. *Palmer v. Sanderson*, 9 F.3d 1433, 1437-1438 (9th Cir. 1993). The Civil Rights Act provides relief only against those who, through their personal involvement as evidenced by affirmative acts, participation in another's affirmative acts, or failure to perform legally required duties, cause the deprivation of the plaintiff's

constitutionally protected rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978); *see also Fayle v. Stapley*, 607 F.2d 858, 862 (9th Cir. 1979).

Finally, a Plaintiff seeking relief in a federal action must allege the suffering of an injury in fact. *Sierra Club v. Morton* 405 U.S. 727, 739-740 (1972). As has been stated by the Seventh Circuit Court of Appeals:

> A section 1983 action is a tort damage action even though the duty the defendant is alleged to have breached is created by the constitution or Federal law. [cite] The elements of a cause of action under section 1983 are (1) a constitutionally recognized duty on the part of the state to conform to a certain standard of conduct for the protection of others against an unreasonable risk of harm; (2) a failure to conform to that standard; (3) a causal connection between the state's failure and the plaintiff's injury; and (4) actual injury.

Benson v. Cady, 761 F.2d 335, 339 (7th Cir. 1985).

Plaintiff has not demonstrated, nor can he prove, an injury and for these reasons, summary judgment should be granted in favor of Defendants and against Plaintiff as to Plaintiff's claims of violation of his Eighth Amendment Rights.

IV.

PLAINTIFF HAS NOT BEEN DENIED THE EQUAL PROTECTION OF THE LAW

The Equal Protection Clause of the Fourteenth Amendment provides that "no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction, the equal protection of the laws." U.S. Const., amend. XIV, § 1. The Clause "does not take from the States all power of classification," *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271 (1979), but "keeps governmental decision makers from treating differently persons who are in all relevant respects alike," *Nordlinger v. Hahn*, 505 U.S. 1, 10, (1992). *See also City* of *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (holding that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike").

To succeed on an Equal Protection claim, a Plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination. Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. *Personnel Administrator of Massachuesetts v. Feeny*, 442 U.S. 256, 279 (1979). It implies that the decision maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing adverse effects on an identifiable group. *Shango v. Jurich*, 681 F.2d 1091, 1104 (7th Cir. 1982). Once this showing is made, the Court proceeds to determine whether

the disparity in treatment can be justified under the requisite level of scrutiny. *See e.g.*, *City of Cleburne*, 473 U.S. at 439-40.

In this case, Plaintiff does not demonstrate that the decision maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on an identifiable group. While Plaintiff doesn't agree with all of the housing practices within the CDC, Plaintiff does not demonstrate that they are for the purpose of singling out a particular group for disparate treatment. Moreover, under the evidence in this case, there is no indication that the housing practices of the CDC are not applied across the board as to all inmates and there is no indication that Plaintiff is alleging this to be the case. Because of this, the Court need not even reach the second prong of the Equal Protection test, that is: whether or not the policy or practice at issues violates a constitutional right.

It has long been recognized that, within the prison environment, there are special considerations--those dictated by the needs and problems inherent in a penitentiary. *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, J., concurring) ("[P]rison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails."); *see also Cruz v. Beto*, 405 U.S. 319, 321 (1972) ("racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons; save for the necessities of prison security and discipline." (internal quotation marks omitted)); *see also In re Long Term*, 174

F.3d 468 (1996) ("[e]ven assuming that analogous action outside the prison context would violate the Constitution, 'when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.'" *quoting Turner v. Safley*, 482 U.S. 78, 89 (1987)).

In 1987, the Supreme Court decided *Turner* and set forth a new standard to evaluate all constitutional claims brought by inmates. Because "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," *Turner*, 482 U.S. at 84 (internal quotation marks omitted), the Supreme Court has held a "prison regulation [that] impinges on inmates' constitutional rights . . . is valid if it is reasonably related to legitimate penological interests" and not an exaggerated response to a particular concern, *id.* at 89. This more deferential standard applies even when the alleged infringed constitutional right would otherwise warrant higher scrutiny.

> Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decision-making process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters

> of what constitutes the best solution to every administrative problem, thereby unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration.

Turner v. Safley at 89 (internal quotation marks omitted).

In determining whether a prison policy is constitutional, the Court considers four factors: (1) whether there is a valid, rational connection between the policy and the penological interest; (2) whether an alternative means of exercising the right remains open to prison inmates; (3) the impact accommodation of the asserted right will have on guards, other inmates, and the allocation of prison resources; and (4) the absence of ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests. *See Turner*, 482 U.S. at 89-90.

In this case, the only issue that could apply is whether the CDC's practice of initially housing male inmates who require double-celling with an inmate of their own ethnic race is reasonably related to legitimate concerns for institutional security and the safety of persons. Defendants maintain that under the four *Turner* factors there is a reasonable relationship and that therefore Plaintiff's Constitutional rights are not implicated. *See Turner*, 482 U.S. at 89-90.

(1) Whether there is a valid, rational connection between the policy and the penological interest.

The initial period in a prison is a critical time for prison officials and inmates alike. Upon an inmate's arrival to a reception center, the CDC has only limited information about the inmate. (See Exh. 4, ¶ 5.) There needs to be a classification summary prepared so that security needs can be established. Disabilities, enemies and gang affiliation and numerous factors are examined. (See Exh. 4, ¶ 5-7.) Before these are known, there could be great risks to inmates if they were, for example, to be celled with a member of a rival gang. This classification period typically takes sixty days. (Exh. 4, ¶ 12.) After that, inmates are moved into more permanent housing and can utilize the period of time to find a compatible cellmate.

The Supreme Court recognizes, "prisons, by definition, are places of involuntary confinement of persons who have a demonstrated proclivity for antisocial, criminal and often violent conduct." *Hudson v. Palmer*, 468 U.S. 517, 526 (1984). The Supreme Court has held that safety is a legitimate penological interest. *Procunier v. Martinez*, 416 U.S. 396, 413, 94 S.Ct. 1800 (1974)). In the instant case, in the judgment of prison officials, they do not have adequate information about the inmate until he is classified. To ensure that they are not placing rival gang members together, there is a rational connection between not housing inmates of potential gangs rivals, together with maintaining the safety of the institution. Therefore, Defendants are acting in a reasonable manner.

(2) Whether an alternative means of exercising the right remains open to prison inmates.

Once through the initial entry and classification periods, inmates may find a compatible cellmate and cell together. As stated by Associate Warden Schulteis,

> After an inmate leaves the reception center and goes into the prison where he will be permanently housed, double-celled inmates are able to select their own cellmates. The inmate indicates on a designated form the inmate with whom he would like to be housed. The inmate with whom he would like to be housed initiates a similar signed request. Unless barred by any other reason, the selection is granted. An inmate may house with someone from his own race or from another race. (Exh. 4, ¶ 14.)

As another alternative, if an inmate has a lower level of classification score, he can be housed in a dormitory. Inmates of all races are housed together in the dormitories. (Exh. 5, ¶ 8.)

(3) The impact accommodation of the asserted right will have on guards, other inmates, and the allocation of prison resources.

Housing inmates without regard to classification concerns that have been expressed would seriously threaten the safety and security of prisons. As stated by Mr. Cambra,

> If race were to be disregarded entirely, however, I am certain, based upon my experience with CDC

prisoners, that there will be problems within the individual cells. These will be problems that the staff will have a difficult time in controlling. I believe there will be fights in the cells and the problems will emanate onto the prison yards. With respect to inside individual cells, I do not feel that prison housing staff are adequately able to deal with the problems that could arise. The cells are small, confined areas and staff cannot see into the cells without going up to them and looking inside. Inmates are capable of placing coverings over the cell windows and then staff cannot see inside at all. Inmates are confined to the cells for numerous, continuous hours. I feel that because there are limited staff to oversee numerous cells, it would be very difficult to assist inmates if the staff were needed in several places at one time. Also, I believe that there would be an additional risk to prison employees as staff members would be accused of "setting an inmate up" if a fight resulting in harm were to break out inside of a cell. (Exh. 4, ¶ 13.)

Therefore, I feel it would be very irresponsible and I would not allow staff to compromise safety and place inmates in cells without considering these issues as being possible consequences. Because of the problems we have on the yards, which are open and easily observable areas, with respect to racial conflicts including riots, which have led to serious injury and deaths, I believe that the same problems could and will surface

inside of the individual cells. I cannot recommend this compromise of safety. (*Id.*, ¶ 14.)

If it is reasonable that there is an increased likelihood of disorder, then the adverse impact is substantial. Accommodating the right poses a threat to the safety of corrections staff and other inmates. Without doubt, inmates should not be encouraged to engage in activities that harm other inmates or staff.

(4) The absence of ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests.

Plaintiff has not demonstrated an alternative which will meet the legitimate penological goal of protecting the safety of California prisons, and no easy alternative exists. The most obvious alternative is not to place inmates into double cells. The costs of this approach, however, seems far from de minimis. To the extent that Plaintiff may claim that prison officials should more carefully supervise each individual cell to prevent violence from occurring, this is also impractical and unreasonable given staffing requirements and resources within California's prison system. To the extent that Plaintiff may contend that all classification could be completed in one day, this is also unreasonable, as Mr. Cambra has indicated the process typically takes 60 days.

Therefore, a consideration of the four factors leads only to the conclusion that the policy and practices at question are constitutional prison policies serving a legitimate and neutral objective of prison security, since initially housing

inmates requiring two-man cells with inmates of the same race is deemed by prison officials to be important to maintaining safety and security during this initial period of time of entry into a prison.

The Supreme Court and this Court have stated that prison administrators should receive wide-ranging deference in the adoption and execution of policies and practices that are needed to preserve the internal order and discipline of institutional security. *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979); *Turner v. Safley*, 482 U.S. 78; *Thornburgh v. Abbott*, 490 U.S. at 401 (1989), deferring to the prison officials' judgment that the accommodation of inmates' requests for publications deemed to be inappropriate by prison officials, jeopardized institutional safety, order, and discipline. *Thornburgh*, 490 U.S. at 404); *Dennis v. Thurman*, 959 F.Supp. 1253 (1997).

The generality of *Turner's* reasonableness test, and common sense as well, suggest that the flexibility open to the prison officials must be observed in institutions for the care and custody of those who have already transgressed society's norms. Because gang violence and racial rioting disrupt the safety, security, order, and discipline in prisons, the approach of celling inmates initially with inmates of their own race upon arrival and then, once in a housing facility, encouraging inmates to find a cellmate with whom they are compatible is necessary to protect the inmates and prison staff. Moreover, under the *Turner* analysis, the question for the Court is not whether this does approach does in fact advance the government interest, but whether the Defendants might reasonably have thought that it would.

Plaintiff has failed to state a constitutional claim against Defendants and for these reasons, the district court properly granted summary judgment in favor of Defendants and against Plaintiff.

IV.

THERE IS NO EVIDENCE OF A CONSPIRACY TO VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHTS

Plaintiff alleges that Defendants conspired against him. 42 U.S.C. § 1985 prohibits individuals fro.:: entering into a conspiracy to deprive an individual of his civil rights. Under the clauses of section 1985, an allegation of racial or class-based animus is an essential element of the claim. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). To establish such animus, a plaintiff must show an "invidiously discriminatory motivation . . . behind the conspirators' action." (*Id.* at 561)

Further, a conspiracy allegation does not give rise to section 1983 liability unless there is an actual deprivation of civil rights. *Woodrum v. Woodward County, Okl.*, 866 F.2d 1121, 1126 (9th Cir.1989); *Escamilla v. City of Santa Ana*, 606 F. Supp. 928, 934, *aff'd*, 796 F.2d 266 (1985).

In this case, Plaintiff has not produced evidence of class-based animus. There has been no violation of a constitutional right and no conduct by Defendants in furtherance of a conspiracy to violate Plaintiff's constitutional rights. Summary judgment should be granted in favor of Defendants on Plaintiff's claim of conspiracy.

V.

PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE RELIEF

It is well established that in order to justify a grant of permanent injunction, the movant has the burden of establishing: (1) that the court's exercise of equity jurisdiction is proper, *Younger v. Harris*, 401 U.S. 37, 43-44 (1971); (2) that the movant has succeeded in proving the merits of its case, *Cib-Geigy Corp. v. Bolar Pharmaceutical Co.*, 747 F.2d 844, 850 (3rd Cir. 1984); and (3) that the balance of equities tips in favor of injunctive relief. *Id.* When a prisoner requests injunctive relief, said request "must always be viewed with great caution because 'judicial restraint is especially called for in dealing with complex and intractable problems of prison administration.'" *Goff v. Harper*, 60 F.3d 518, 520 (8th Cir.1995) (citations omitted). Where a prisoner requests an injunction that would require the Court to intervene with the management of a state prison, "appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." *Rizzo v. Goode*, 423 U.S. 362, 379 (1976); *see Meachum v. Fano*, 427 U.S. 215, 229 (1976) ("The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States.").

In this case, the balance of the equities does not justify injunctive relief. Defendants, in their experience, know that there will be the risk of violence if the requested relief was granted. Defendants are not adequately equipped to handle the additional violence, and the prison facilities are not

designed to handle additional violence. Moreover, the risk of injury to inmates to staff is known and is too great to be ignored.

VI.

DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Prison officials, performing discretionary functions within the limits of their duties, receive a qualified immunity from damages in Civil Rights actions unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Procunier v. Navarette*, 434 U.S. 555, 561-562, 98 S. Ct. 855 (1978); *Harlow v. Fitzgerald*, 457 U.S. 800, 818-819, 102 S. Ct. 2727 (1982). The purpose of this rule is to permit such officials to undertake their responsibilities without fear that they will be held liable in damages for actions that appear reasonable at the time but are later held to violate statutory or constitutional rights. *Id.* at 819; *Kraus v. County of Pierce*, 793 F.2d 1105, 1108 (9th Cir. 1986). "As the qualified immunity defense has evolved, it provides ample protection for all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092 (1986). An official is denied qualified immunity only if the law was clearly established and a reasonable official could not have believed that his conduct was lawful. *Somers v. Thurman*, 109 F.3d 614, 617 (9th Cir. 1997).

Thus, in deciding whether an official is entitled to qualified immunity, the court must inquire: (1) whether the

law governing the official's conduct was clearly established at the time of the alleged violation; and (2) under the law, whether a reasonable official could have believed the conduct did not violate an identifiable right. *See Act Up!/Portland v. Bagley*, 988 F.2d 868, 871-72 (9th Cir.1993). The inquiry focuses on whether a reasonable official in the position of any of the defendants could have believed that his conduct in question was lawful. *See id.* at 872. Additionally, the Ninth Circuit has stated that,

> The question of whether a reasonable [official] could have believed [that his conduct was lawful] is 'an essentially legal question' . . . that should be determined by the district court at the earliest possible point in the litigation. Where the underlying facts are undisputed, a district court must determine the issue on motion for summary judgment.

See id., at 873 (citation omitted).

In this case, there was no violation of a clearly established law. Moreover, Defendants could have reasonably believed that their conduct was lawful under the established legal principles. First, under *Lee v. Washington*, 390 U.S. 333, 334 (1968), prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails. Second, Defendants could have reasonably believed that placing Plaintiff into a cell with a person of his own race for a short duration until they are able to classify them and ensure there are no rival gang issues

Appendix I

at stake is lawful under the established law. Thus, both defendants are entitled to qualified immunity. *See Act Up!/ Portland*, 988 F.2d at 871-72.

CONCLUSION

Based on the foregoing, summary judgment should be granted in favor of Defendants Rowland, Gomez and Cambra and against Plaintiff.

DATED: April 6, 2001

BILL LOCKYER
Attorney General

DAVID P. DRULINER
Chief Assistant Attorney General

PAUL D. GIFFORD
Senior Assistant Attorney General

SUSAN DUNCAN LEE
Supervising Deputy Attorney General

s/ Sara E. Turner
SARA E. TURNER
Deputy Attorney General

Attorneys for Defendants

APPENDIX J — DEFENDANTS' NOTICE OF MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE DATED APRIL 9, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants,

DEFENDANTS' NOTICE OF MOTION FOR SUMMARY JUDGMENT PURSUANT TO RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

TO: PLAINTIFF GARRISON S. JOHNSON AND TO HIS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on May 7, 2001, at 10:00 a.m. or as soon thereafter as the matter may be heard in

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Courtroom Two of the above-referenced court located at 312 N. Spring Street, Los Angeles, California, Defendants J. Gomez, J. Rowland and S. Cambra will move this Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This motion is made on the grounds that the allegations of the Complaint fail to state a claim for relief under 42 U.S.C. § 1983, that Plaintiff lacks standing, that there are no genuine issues of material fact in dispute, that Defendants are entitled to the defense of qualified immunity and that Defendants are entitled to judgment as a matter of law.

This motion is based upon this notice of motion and motion, the memorandum of points and authorities filed in support, the Court's file in this action, and the proposed order, a copy of which is submitted herewith.

DATED: April 6, 2001

Appendix J

BILL LOCKYER
Attorney General

DAVID DRULINER
Chief Assistant Attorney General

PAUL GIFFORD,
Senior Assistant Attorney General

SUSAN DUNCAN LEE
Supervising Deputy Attorney General

s/ Sara Turner
SARA TURNER
Deputy Attorney General

Attorneys for Defendants

Appendix J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants,

DECLARATION OF S. CAMBRA IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Steven Cambra, declare as follows:

1. I am employed with the California Department of Corrections (the "CDC") and have been so employed for 30 years. Presently, I am the acting Director of Corrections.

2. In addition to serving as the Director of the Department of Corrections, I have served as a Regional Administrator for the CDC. In addition to these capacities, I have served as a Warden, an Associate Warden, a Captain, Lieutenant, Sergeant and Correctional Officer.

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3. I have worked with inmates in all housing security levels. As the Regional Administrator, I oversaw the prison institutions within my Region. As the Acting Director, I oversee all of the prisons.

4. I am familiar with the CDC's policies and practices with respect to housing decisions. Inmates are housed double-celled (two inmates per cell) or in dormitories. With respect to double-celling, a critical goal on the part of prison officials is that this be done in a manner to maintain the inmates' individual safety as well as the safety of the staff and the institution as a whole.

5. An initial housing decision is one that is made as soon as the inmate arrives at the institution after being sentenced. This initial housing institution is called a reception center. Upon an inmate's arrival to a reception center, particularly if he has never been housed in any CDC facility, CDC has only limited information about the inmate. The inmate then goes through a classification process. It is during this process that an evaluation is done as to his physical, mental and emotional health. Also discussed during this time are vocational and educational goals, and the inmate is given a battery of tests.

6. The inmate's history in jail and any previous commitments are reviewed to begin to determine his security needs and classification level. The inmate is also given written documentation and orientation materials. Also, if an inmate has a disability, CDC

evaluates his needs with respect to that disability. CDC looks at whether or not the inmate has enemies in the prison, such as people who testified against him in the past or in his criminal case, co-defendants, inmates who he may have had disputes with during previous prison placements.

7. With respect to initial double-cell housing placement, CDC looks at several factors. These include, but are not limited to, gender, age, classification score, case concerns, custody concerns, mental and physical health, enemy situations, gang affiliation, background, history and custody designation.

8. In addition to the factors identified in paragraph 7, above, race is considered during the initial double-cell housing classification decision.

9. The reason race is a consideration in an initial housing decision is, based on CDC's experience, that CDC finds that prisoners make this out to be an important issue. The reason CDC has found that inmates believe race to be an important issue stems from the identification that prisoners, particularly male prisoners, make of themselves. The second reason CDC finds that male prisoners make this out to be an important issue stems from the gang involvement that is a part of many of the inmates' backgrounds and is generally found to play a role in those inmates' anti-social, criminal behavior.

10. Therefore, when an inmate arrives at a CDC facility, if not required to be single-celled or able to be housed in a dormitory, he is generally initially; housed double-celled with an inmate of his own ethnic race. If the inmates indicate they are not able to get along with their cellmate, then prison officials evaluate this complaint and either continue their housing situation or house them with someone else.

11. If any inmate feels that his housing situation or cellmate poses a danger to his safety, then he is rehoused.

12. After the orientation period (which typically takes around 60 days), the inmate is either retained at the institution as a his permanent housing or is transferred to the institution where the classification representatives determine he would be most suited. If he is to be housed at another institution, then the inmate will go through a housing screening process. In fact, every time an inmate is transferred, his housing and status requirements are evaluated prior to cell placement.

13. Despite Plaintiff s belief, at no institution is "race" the "sole factor" in a housing decision. If race were to be disregarded entirely, however, I am certain, based upon my experience with CDC prisoners, that there will be problems within the individual cells. These will be problems that the staff will have a difficult time in controlling. I believe there will be fights in the cells and the problems will emanate

onto the prison yards. With respect to inside individual cells, I do not feel that prison housing staff are adequately able to deal with the problems that could arise. The cells are small, confined areas and staff cannot see into the cells without going up to them and looking inside. Inmates are capable of placing coverings over the cell windows and then staff cannot see inside at all. Inmates are confined to the cells for numerous, continuous hours. I feel that because there are limited staff to oversee numerous cells, it would be very difficult to assist inmates if the staff were needed in several places at one time. Also, I believe that there would be an additional risk to prison employees as staff members would be accused of "setting an inmate up" if a fight resulting in harm were to break out inside of a cell.

14. Therefore, I feel that not considering race in an initial housing decision would be very irresponsible and I would not allow staff to compromise safety and place inmates in cells without considering these issues as being possible consequences. Because of the problems we have on the yards, which are open and easily observable areas, with respect to racial conflicts including riots, which have led to serious injury and deaths, I believe that the same problems could and will surface inside of the individual cells. I cannot recommend this compromise of safety.

15. In my experience with the CDC, I have found that the ideal situation for a two-person cell is that an inmate finds another inmate with whom he or she

is compatible and both inmates indicate to their prison housing staff of their request to be housed together. In light of this goal, I would not recommend that race not be considered in the initial housing decision.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9 day of April, 2001, at Sacramento, California.

s/ Steven Cambra
STEVEN CAMBRA, DIRECTOR (A)
CALIFORNIA DEPARTMENT
OF CORRECTIONS

Appendix J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants,

DECLARATION OF L. SCHULTEIS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Linda Schulteis, declare as follows:

1. I am employed with the California Department of Corrections (the "CDC") and have been so employed for twenty-four years. Presently, I am an Associate Warden at the California State Prison for Los Angeles County located in Lancaster ("CSP-Lancaster").

2. In addition to serving as an Associate Warden, I have served as a Captain Lieutenant, Sergeant and Correctional Officer.

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3. In my present capacity as an Associate Warden, among my duties, I oversee the Receiving and Release ("R & R") section of CSP-Lancaster and am responsible for the aspect of the prison which assigns inmates to cells upon initial arrival at this institution.

4. CSP-Lancaster is a high, security, Level III and IV prison. When inmates are received into the prison, it is essential that they are promptly assigned a bed. A report generated by the Control Sergeants indicates which beds are currently empty.

5. If the inmate will be housed in a double-cell, the initial housing is done by generally housing an inmate with another inmate of his same ethnic race. In addition, we also look at any prison or street gang affiliation and make every attempt not to house inmates with members of what could be considered a rival gang or rival disruptive group.

6. We also try to house an inmate with an inmate close to his own age. Also, for example, we attempt to assign non-smokers with non-smokers, and vice versa to alleviate complaints about smoking odors on property or clothing. We also consider other factors such as, but not limited to, enemy concerns, custody level and classification.

7. We make housing decisions in the manner described above because we have found that it will be the least likely to lead to conflict among the

prisoners within their respective individual housing unit (cell) as well as resulting in the least amount of conflict among the prisoners when they are all out together on the yard.

8. With respect to those inmates that qualify to live in dormitory housing, inmates of all races are housed together. We attempt to balance the number of inmates within each race in the dormitories in order to avoid the possibility of racially based conflict, which has occurred in the past

9. As to jobs, meals, yard and recreation time, vocational and educational assignments, inmates from all races participate together.

10. However, as to the initial housing assignment if we were not to consider race and gang affiliation in the initial double-cell housing decision, I am certain that there will be conflicts both in the cells and the conflict will flow onto the yards. Although we would rather the inmate population not focus on these areas in a manner leading to conflict, we find that the inmates do place a weight on the issue. I believe this focus is because of the manner in which prison inmates identify themselves both before and after they have been sent to prison and because inmates spend very long hours in small cells.

11. At CSP-Lancaster, if we were to disregard the initial housing placement being done in the manner set

forth in paragraph five, then I am certain there would be serious violence among inmates. I have worked in five different CDC institutions and this would be true for all of them.

12. I am therefore not willing to knowingly disregard the factors and place an inmate into jeopardy and would not compromise an inmate or group of inmates safety by taking steps that I know would result in violence and conflict. My responsibility is to preserve the safety and security of the institution, inmates and staff and given that responsibility, I would therefore not ignore a known issue impacting safety.

13. After an inmate leaves the reception center and goes into the prison where he will be permanently housed, double-celled inmates are able to select their own cellmates. The inmate indicates on a designated form the inmate with whom he would like to be housed. The inmate with whom he would like to be housed initiates a similar signed request. Unless barred by any other reason, the selection is granted. An inmate may house with someone from his own race or from another race.

14. This is a policy designed around inmates finding a compatible cellmate. We get hundreds of these requests and almost all are granted This policy has compatibility as the goal, and it operates effectively, is encouraged and results in the lowest potential for conflict or violence among the inmates which is the desired goal of prison administrators.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of April, 2001, at Sacramento, California.

s/ L. Schulteis AW
L. SCHULTEIS, ASSOCIATE WARDEN
CSP-LANCASTER

Appendix J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants,

DECLARATION OF S. TURNER

I, Sara Turner, declare and state:

1. I am employed by the California Attorney General's Office as a Deputy Attorney General in the Correctional Law Section. I am admitted to practice before this Court and courts of the State of California. I have been assigned to represent the Defendants in the above-entitled action.

2. In the course of preparing to file a motion for summary judgment pursuant to the order of the Court, this office requested copies of various documents from Plaintiff Garrison Johnson's correctional file.

3. Attached hereto is a true and correct copy of the following documents which were submitted to this office in response to that request.

These document are submitted in support of Defendants' motion for summary judgment.

Exhibit 1: Abstract of Judgment for Garrison Johnson.

Exhibit 2: CDC-112, Chronological History for Garrison Johnson.

Exhibit 3: Institutional Staff Recommendation Summary for Garrison Johnson, D-59672.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 9th day of April, 2001, at San Francisco, California.

s/ Sara Turner
SARA TURNER

P.C.

R S Davis

DEPT. 115

6/22/87

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date: June 17, 1987

HONORABLE: MICHAEL L BURKE JUDGE, D BINGHAM Deputy Sheriff, J M PULIDO Deputy C., P LA POINTE Reporter

(Parties and counsel checked if pres

A778000

PEOPLE OF THE STATE OF CALIFORNIA

VS

X JOHNSON, GARY X046698 8417099

Counsel for Plaintiff: X IRA A REINER, DISTRICT ATTY. BY R SCHWARTZ DEPUTY

Counsel for Defendant: X S WEISS PVT.

(Boxes checked if order applicab

NATURE OF PROCEEDINGS PROBATION AND SENTENCE

Court advises defendant of his appeal/parole rights.
Notice of Appeal recieved this date.
Pay restitution fine of $100.00.

PROBATION DENIED. SENTENCE AS INDICATED BELOW.

Whereas the said defendant having been duly found guilty in this court of the crime of MURDER (187 PC), as charged in count 12 of the information; which the Jury found to be murder in the first degree

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the State Prison. for the term of 25 years to LIFE.

☐ Defendant is given credit for.....days in custody (includes_____days good time/work time).

It is further Ordered that the defendant be remanded into the custody of the Sheriff of the County of Los Angeles and delivered by him into the custody of the Director of Corrections at the California State Institution

☒ for Men at Chino, California
☐ for Women at Frontera, California
☐ .....

☐ Remaining count(s) dismissed in interests of justice.
☐ Bail exonerated.

ENTERED
06-17-87
FRANK S ZOL
COUNTY CLERK
AND CLERK OF THE
SUPERIOR COURT

NJ

2 TRIPLICATE (REV. 7-65) 7-65 C-139

JUDGMENT

PINK ORIGINAL TO FILE
WHITE COPY TO MICROFILM
YELLOW COPY TO STATEWIDE DISTRIBUTI
GREEN COPY TO PROBATION EXPEDITER

256a

Appendix J

ABSTRACT OF JUDGMENT – COMMITMENT

FORM DSL 29

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
BRANCH CENTRAL CRIMINAL

COURT I.D. 1 9 0 0 0 1

CASE NUMBER(S): A778000 -A; -B; -C; -D; -E

PEOPLE OF THE STATE OF CALIFORNIA
DEFENDANT: JOHNSON, GARY
AKA:

VERSUS [X] PRESENT [ ] NOT PRESENT

COMMITMENT TO STATE PRISON
ABSTRACT OF JUDGMENT [X] AMENDED ABSTRACT

DATE OF HEARING (MO) (DAY) (YR)	DEPT. NO.	JUDGE	CLERK
06 17 87	115	MICHAEL L BURKE	J M PULIDO

REPORTER	COUNSEL FOR PEOPLE	COUNSEL FOR DEFENDANT	PROBATION NO. OR PROBATION OFFICER
P LA POINTE	R SCHWARTZ	S WEISS PVT	X046698

1. DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONIES:

A. [X] ADDITIONAL COUNTS ARE LISTED ON ATTACHMENT 1A

COUNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION MO	DAY	YEAR	CONVICTION BY JURY TRIAL	COURT TRIAL	PLEA	FELONY (F) OR (M)	SENTENCE RELATION CONCURRENT	CONSECUTIVE (C) VIOLENT	CONSECUTIVE (C) NONVIOLENT	CONSECUTIVE (C) FULL TERMS	CONSECUTIVE (C) SUBSTANTIAL SENTENCE ENHANCEMENTS	654 STAY	PRINCIPAL OR CONSECUTIVE TIME IMPOSED: YEARS	MONTHS
1	PC	213.5	RES ROBBERY	85	02	24	87	X			F							6	
4	PC	213.5	RES ROBBERY	85	02	24	87	X			M		X					1	4
7	PC	245(a)(1)	ASLT W/DLY WPN	86	02	24	87	X			M		X					1	

2. ENHANCEMENTS (CHARGED AND FOUND, STRICKEN, TIME IMPOSED):

COUNT	12022(a) C/P	S	I	12022(b) C/P	S	I	12022.5(a) C/P	S	I	12022.5(b) C/P	S	I	12022.5 C/P	S	I	12022.6(a) C/P	S	I	12022.6(b) C/P	S	I	12022.7 C/P	S	I	12022.8 C/P	S	I	C/P	S	I

3. INCOMPLETED SENTENCE(S) CONSECUTIVE:

COUNTY	CASE NUMBER	CREDIT FOR TIME SERVED

4. OTHER ORDERS:

COUNTS 1,4,7,16 AND 18 TO RUN CONSECUTIVE WITH COUNT 12.

5. A. NUMBER OF PRIOR PRISON TERMS:

§	C/P	S	I
667.5(a)	0	0	0
667.5(b)	0	0	0
667.5(b)	0	0	0

B. NUMBER OF PRIOR FELONY CONVICTIONS:

§	C/P	S	I
667.5(a)	0	0	0

6. TOTAL TIME IMPOSED ON ALL ATTACHMENT PAGES (FORM DSL 290-A): 2 8

7. TIME STAYED § 1170.1(a) [5-YEAR LIMIT] AND/OR § 1170.1(f) [DOUBLE BASE LIMIT]:

8. TOTAL TERM IMPOSED: 11

9. EXECUTION OF SENTENCE IMPOSED:

A. [X] AT INITIAL SENTENCING HEARING
B. [ ] AT RESENTENCING PURSUANT TO DECISION ON APPEAL
C. [ ] AFTER REVOCATION OF PROBATION
D. [ ] AT RESENTENCING PURSUANT TO RECALL OF COMMITMENT [PC1170(d)]

10. DATE SENTENCE PRONOUNCED: MO 06 DAY 17 YEAR 87

CREDIT FOR TIME SPENT IN CUSTODY: TOTAL DAYS 606 INCLUDING: ACTUAL LOCAL 404 LOCAL CONDUCT CREDIT 202 STATE INSTITUTIONS [ ] CMH [ ] CDC

11. DEFENDANT IS REMANDED TO THE CUSTODY OF THE SHERIFF, TO BE DELIVERED:

[X] FORTHWITH
[ ] AFTER 48 HOURS, EXCLUDING SATURDAYS, SUNDAYS AND HOLIDAYS
INTO THE CUSTODY OF THE DIRECTOR OF CORRECTIONS AT THE RECEPTION-GUIDANCE CENTER LOCATED AT:
[ ] CALIF. INSTITUTION FOR WOMEN — FRONTERA
[ ] CALIF. [illegible] FACILITY — [illegible]
[X] CALIF. INSTITUTION FOR MEN — CHINO
[ ] OTHER (specify):

CLERK OF SUPERIOR COURT

I hereby certify the foregoing to be a correct abstract of the judgment made in this action.

DEPUTY'S SIGNATURE: [signature]

DATE: DEC 10 1987

SUPERIOR COURT LOS ANGELES COUNTY

This form is prescribed pursuant to Penal Code §1213.5 to satisfy the requirements of Penal Code §1213 (Abstract of Judgment) and Penal Code §1213.5 (Commitment) for determinate sentences under Penal Code §1170. A copy of probation report shall accompany the Department of Corrections' copy of this form pursuant to Penal Code §1203. A copy of the sentencing proceedings and any supplementary probation report shall be transmitted to the Department pursuant to Penal Code §1203.01. Attachments may be used but must be incorporated by reference.

Form Adopted by the Judicial Council of California
Effective July 1, 1981

ABSTRACT OF JUDGMENT – COMMITMENT
FORM DSL 290

Pen.C. 1213.5

Appendix J

STATE OF CALIFORNIA

CHRONOLOGICAL HISTORY

DEPARTMENT OF CORRECTIONS

CDC 112 (9-83)

Date	Chronological Listings	Initials	Dead Time	Release Date
JUN 22 1987	REC-CIM			
7-3-87	Intake Audit	L		
7-6-87	Add'l Commit rec'd by mail.			
	LA Co A778000 TT: 36 to life			
	cc w/PT. Term Sheet 6-22-87	(W)		
7-14-87	Audited			
	RECD FOLSOM STATE PRISON			
JUL 31 1987				
11-20-87	Intake Audit (A2)	LH		
12-10-87	Amended Abstract rec'd on case #A778000			
	No change in term.	LH		
7-24-89	Credit loss for 30 days CDC 115 of 6-2089	LH	MEPD	10-9-2010
7-24-89	Notice required per 3058.6 PC	LH		
11-18-89	MEPD reviewed per In re Monigold.		MEPD	7-22-2010
	Pl. on 11/96 Doc #1. (A2)			
1-30-91	work group change for DSL portion of term, A1 eff		DOC #1	10/96
	12-6-90 (A1)		MEPD	10-19-2009
7-30-91	RECEIVED CSP FOLSOM NEW FACILITY			
8-21-91	Rec'd O/C Folsom	cwb		
9-5-91	Intake Audit - BCL, CDC-115 of 7-30-91, log			
	I910754, 60 days; work group change for DSL		DOC #1	10/96
	portion of term, A2 eff 8-20-91 (A2)		MEPD	8-19-2010
10-22-91	work group change for DSL portion of term, A1 eff 9-8-91 (A1)		MEPD	12-5-2009
			DOC #1	4/96
12-24-91	RECEIVED CSP FOLSOM NEW FACILITY			
12-31-91	Rec'd O/C Folsom			
1-10-92	Intake - Facility Doc #1 9-92	Bee	MEPD	5-10-2010
2-7-92	WCL Log 1911254 dated 12-24-91,			
	30 days	Bee	MEPD	6-10-2010
3-12-92	Transfer audit	Bee		

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Number D-59672 Name JOHNSON, GARRISON

Appendix J

STATE OF CALIFORNIA

CHRONOLOGICAL HISTORY

DEPARTMENT OF CORRECTIONS

CDC 112 (9-83)

Date	Chronological Listings	Initials	Dead Time	Release Date
3-12-92	REC'D CALIPATRIA STATE PRISON	Efre		
12-3-93	Arcvd. CMC East	dwr		
1-8-93	OTC Fol. Plaint Case# CIV S-91-1351 EJW AMP	DD		
2-2-94	RTN OTC Fol. Plaint Case# CIV S-91-1351 EJW AMP	DD		
2-24-94	Intake Audit. 30 day BCL. CDC 115 of 10-12-93, Log# 1093B33. Restitution ordered per SB County Cases: #A778000 for $100.00; #A751285 for $100.00 & # A775207 for $100.00. Doc#1=10-96 INIT=6-2009.	DD	PAROLED	7-1-2010
15 MAR 1994	REC'D CSP-LAC	BB		
11-17-94	On Take Audit BCL 30 day A94080436 8-10-94, BCL 90 day Fd94080080 9-29-94 Doc#1 9/96 in.	DD	Paroled	2-12-2011
12/7/94	XFER TO RJD FOR OTC WITNESS: CASE#931785J	BB		
4-5-95	REC'd from OTC/RJD CSP-LAC	DD		

Number D59672 Name Johnson, Harrison Page 2

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INSTITUTIONAL STAFF RECOMMENDATION SUMMARY

SOURCES OF REPORT: Probation officer's reports dated 3/24/87, 6/9/86 and 2/21/86, Abstracts of Judgment in cases A778000, A775207 and A751285, CLETS printout of 6/25/87 and personal interview on 7/17/87.

CONFIDENTIAL INFORMATION: None as of dictation.

HOLDS/DETAINERS: None as of dictation.

MEDICAL/DENTAL: Full duty no camp due to history of gunshot wound to head and left eye blindness. Dental class N/A.

PSYCHIATRIC/PSYCHOLOGICAL: No referral indicated.

7/20/87 Leisla M. Howell, Senior Psychologist

WORK SKILLS: Johnson's only prior work experience was employment in a car wash.

NARCOTICS/DRUGS/ALCOHOL: Johnson admits to occasional use of alcohol and since the age of fifteen, he has been using marijuana, PCP and cocaine. He admits to experimentation of "acid" and methamphetamines.

ESCAPE HISTORY: None as of dictation.

ARSON HISTORY: None as of dictation.

SEX RELATED OFFENSES: None as of dictation.

ACADEMIC/VOCATIONAL: Johnson has a Revised Beta IQ of 44 with a grade point level of 4.3. He claims he attended school until the eleventh grade.

CASEWORK FOLLOW-UP: Current CII, FBI and any law enforcement agency information.

EVALUATION: Johnson is a twenty-two year old first termer committed to CDC on 6/22/87 from Los Angeles County with one count of Murder First, three counts of Residential Robbery and one count of Assault With a Deadly Weapon with a total term of thirty-six years to life. The essence of the offense is that during the months of December, 1985 and January, 1986, Johnson and his codefendant were involved in four residential robberies wherein they assaulted the victim with deadly weapons and firearms and pistol whipped one victim to death.

Johnson's prior criminal history began as a juvenile at the age of thirteen consisting of property and assault offenses. He has been placed in juvenile camp, placed on probation and served county jail sentences.

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SOCIAL FACTORS

PARENTS	NAME	DOB/AGE	OCCUPATION	ADDRESS
MOTHER:	Helen Johnson	47	Nurse	Los Angeles,CA.
FATHER:	Garrison Johnson	?	Mechanic	Philadelphia, Pa.

SIBLINGS	DOB/AGE	SIBLINGS	DOB/AGE
Steven Johnson	20		
Dave Johnson	18		
Sandy Johnson	24		
Brenthe Johnson	26		
Eunice Johnson	16		

MARRIAGES	LOCATION	DATE	CURRENT ADDRESS	OUTCOME
None				

NOT LEGALIZED
None

CHILDREN	DOB/AGE	SUPPORTED BY	LIVING WITH
Bo Garrison Johnson	14 mos.	AFDC	Mother-Jamea Harding Living with maternal aunt.

FAMILY ARREST HISTORY
Brother Steven Johnson - CYA - robbery.

SOCIAL SECURITY NUMBER: Unknown
DRIVER'S LICENSE: None
RELIGION: Baptist

NAME JOHNSON NUMBER D-59672 DATE 7/20/87

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INITIAL PSYCHOLOGICAL SCREENING

TESTS ADMINISTERED: California Achievement Test, Revised Beta, Draw-A-Person, Who-Are-You, Sentence Completion, Personal Information.

INTELLECTUAL CLASSIFICATION: Moderate Mental Retardation.

Leisla M. Howell, Senior Psychologist
Licensed Psychologist No.: PA 000183

B Battery

Appendix J

During the personal interview, Johnson was polite and cooperative. He was very candid concerning his extensive drug usage. He denied current gang involvement but claimed during his early teens, he "gang banged" as a CRIP. He adamantly denied guilt in the committing offense or any of the charges he had been arrested for. In fact he tried to deny his entire arrest record; he even denied that any of his codefendants were guilty in any of the cases. It appears Johnson has difficulty in accepting his behavior and is attempting to convince everyone, even himself of his criminal history.

While processing through RCC/CIM, Johnson has remained disciplinary free but considering his age and immaturity, possible management problems can be anticipated. He should be able to function in a mainline setting consistent with his classification score.

RE-ENTRY PLANS: Not applicable.

TRANSFER

CLASSIFICATION SCORE: 115 **CUSTODY LEVEL:** IV

INSTITUTION RECOMMENDATION: Folsom/CCI-IV.

REASON FOR OUT OF CLASS RECOMMENDATION:

CORRECTIONAL COUNSELOR: M. James, CC I, 7/17/87

SUPERVISOR'S RECOMMENDATION: Folsom. Gamg oriented. Youthful offender. Management concerns anticipated. Violent offenses.

7-21-87 L. Myers, CCII(A) aam 7-23-87

6/5/97
LA County
Last County
of residence
B. Jackson CI

APPENDIX K — STATEMENT OF UNCONTROVERTED FACT AND CONCLUSIONS OF LAW [U.S. DISTRICT COURT CENTRAL DISTRICT RULE 7.14] DATED APRIL 9, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants,

STATEMENT OF UNCONTROVERTED FACT AND CONCLUSIONS OF LAW [U.S. DISTRICT COURT CENTRAL DISTRICT RULE 7.14]

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

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The above entitled case came on regularly for hearing on motion for summary judgment, and the court, having duly considered the complaint, the moving papers, the exhibits and other papers on file in this action, now finds the following:

FINDINGS OF FACT

I.

Plaintiff is a prisoner in the custody of the California Department of Corrections (the "CDC"). (4th Am. Compl., ¶ 2.)

II.

Plaintiff was sentenced to state prison on June 17, 1987, by the Superior Court of the California, County of Los Angeles, for twenty-five years to life in state prison for one count of violation of Penal Code § 187 (murder). Plaintiff also received an additional eleven year consecutive term for four counts of violation of Pen. Code § 213.5 (residential robbery) and one count of violation of Pen. Code § 245(a)(1) (assault with a deadly weapon). (Exh. 1, Judgment..)

III.

Plaintiff was received at the California Institution for Men on June 22. 1997. (Exh. 2, CDC- 112.)

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IV.

Plaintiff's classification summary was prepared on July 20, 1987. (Exh. 3, Institutional Classification Summary.) The document makes no reference to Plaintiff's race. (*Id.*)

V.

Defendants Rowland and Gomez are former Directors of the CDC. (Answer, ¶ 4.)

VI.

Defendant Steven Cambra, sued in his official capacity, is the Acting Director of the CDC. (Declaration of Steven Cambra, hereinafter, Exh. 4, ¶ 1.)

VII.

Plaintiff never had any personal contact with Defendant, Mr. Rowland or Mr. Gomez (Plaintiff Garrison Johnson's Deposition, attached to Notice of Lodgement, filed and served herewith, page 20: 19-21:9).

VIII.

Inmates are housed double-celled (two inmates per cell) or in dormitories. (Exh. 4, ¶ 4.)

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IX.

Plaintiff's custody level does not qualify him for dormitory housing. (Pl's Dep., page 44: 20-45: 6.)

X.

Plaintiff is housed in a two-man cell at CSP-Lancaster. (Compl., ¶ 9.)

XI.

Plaintiff's cell-mate is Mr. Stubbs. (Pl's. Dep., p. 18:25-19:1.) Plaintiff cells with Mr. Stubbs because he finds they are compatible. (*Id.* at, pp. 19: 10-20: 6.)

XII.

If Plaintiff found he was compatible with someone of a different race and wanted to house with that person, he could. (Pl's Dep., p. 25: 11-18.)

XIII.

An initial housing decision is one that is made as soon as the inmate arrives at the institution after being sentenced. This initial housing institution is called a reception center. Upon an inmate's arrival to a reception center, particularly if he has never been housed in any CDC facility, CDC has only limited information about the inmate. The inmate then goes through a classification process. It is during this process that an evaluation is done as to his physical, mental and

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emotional health. Also discussed during this time are vocational and educational goals, and the inmate is given a battery of tests. (Exh. 4, ¶ 5.)

XIV.

The inmate's history in jail and any previous commitments are reviewed to begin to determine his security needs and classification level. The inmate is also given written documentation and orientation materials. Also, if an inmate has a disability, CDC evaluates his needs with respect to that disability. CDC looks at whether or not the inmate has enemies in the prison, such as people who testified against him in the past or in his criminal case, co-defendants, inmates who he may have had disputes with during previous prison placements. (Exh. 4, ¶ 6.)

XV.

With respect to initial double-cell housing placement, CDC looks at several factors. These include, but are not limited to, gender, age, classification score, case concerns, custody concerns, mental and physical health, enemy situations, gang affiliation, background, history and custody designation. (Exh. 4, ¶ 7.)

XVI.

In addition to the factors identified above, race is considered during the initial double-cell housing classification decision. (Exh. 4, ¶ 8.)

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XVII.

The reason race is a consideration in an initial housing decision is, based on CDC's experience, that CDC finds that prisoners make this out to be an important issue. The reason CDC has found that inmates believe race to be an important issue stems from the identification that prisoners, particularly male prisoners, make of themselves. The second reason CDC finds that male prisoners make this out to be an important issue stems from the gang involvement that is a part of many of the inmates' backgrounds and is generally found to play a role in those inmates' anti-social, criminal behavior. (Exh. 4, ¶ 9.)

XVIII.

Therefore, when an inmate arrives at a CDC facility, if not required to be single-celled or able to be housed in a dormitory, he is generally initially, housed double-celled with an inmate of his own ethnic race. If the inmates indicate they are not able to get along with their cellmate, then prison officials evaluate this complaint and either continue their housing situation or house them with someone else. (Exh. 4, ¶ 10.)

IXX.

If any inmate feels that his housing situation or cellmate poses a danger to his safety, then he is rehoused. (Exh. 4, ¶ 11.)

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XX.

After the orientation period (which typically takes around 60 days), the inmate is either retained at the institution as his permanent housing or is transferred to the institution where the classification representatives determine he would be most suited. If he is to be housed at another institution, then the inmate will go through a housing screening process. In fact, every time an inmate is transferred, his housing and status requirements are evaluated prior to cell placement. (Exh. 4, ¶ 12.)

XXI.

Plaintiff transferred to CSP-Lancaster on March 15, 1994. (Exh. 2.)

XXII.

At CSP-Lancaster, with respect to the initial housing, if the inmate will be housed in a double-cell, the initial housing is generally done by housing an inmate with another inmate of his same ethnic race. In addition, at CSP-Lancaster, administrators look at any prison or street gang affiliation and make every attempt not to house inmates with members of what could be considered a rival gang or rival disruptive group. (Declaration of L. Schulteis, Associate Warden, CSP-Lancaster, hereinafter, Exh. 5, ¶ 5.)

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XXIII.

At CSP-Lancaster, prison officials also try to house an inmate with an inmate close to his own age. Also, for example, prison officials attempt to assign non-smokers with non-smokers, and vice versa to alleviate complaints about smoking odors on property or clothing. Prison officials also consider other factors such as enemy concerns, custody level and classification. (Exh. 5, ¶ 6.)

XXIV.

At CSP-Lancaster, prison officials make housing decisions in the manner described above because they find that it will be the least likely to lead to conflict among the prisoners within their respective individual housing unit (cell) as well as resulting in the least amount of conflict among the prisoners when they are all out together on the yard. (Exh. 5, ¶ 7.)

XXV.

With respect to those inmates that qualify to live in dormitory housing, inmates of all races are housed together. Prison officials attempt to balance the number of inmates within each race in the dormitories in order to avoid the possibility of racially based conflict, which has occurred in the past. (Exh. 5, ¶ 8.)

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XXVI.

As to jobs, meals, yard and recreation time, vocational and educational assignments, inmates from all races participate together. (Exh. 5, ¶ 9.)

XXVII.

As to the initial housing assignment, if prison officials at CSP-Lancaster were not to consider race and gang affiliation in the initial double-cell housing decision, there will be conflicts both in the cells and the conflict will flow onto the yards. Although prison officials would prefer the inmate population not focus on these areas in a manner leading to conflict, prison officials find that the inmates do place a weight on the issue. The reason is that is because of the manner in which prison inmates identify themselves both before and after they have been sent to prison and because inmates spend very long hours in small cells. (Exh. 5, ¶ 10.)

XXVIII.

At CSP-Lancaster, if prison officials we were to disregard the initial housing placement being done in the manner set forth above, then it is certain there would be serious violence among inmates. (Exh. 5, ¶ 11.)

XXIX.

Prison officials making initial housing decisions at CSP Lancaster are not willing to knowingly disregard the factors and place and inmate into jeopardy and would not

compromise an inmate or group of inmates safety by taking steps that they know would result in violence and conflict. As it is a duty of prison officials to preserve the safety and security of the institution, inmates and staff and given that responsibility, staff would therefore not ignore a known issue impacting safety. (See Exh. 5, ¶ 12.)

XXX.

After an inmate leaves the reception center and goes into the prison where he will be permanently housed, double-celled inmates are able to select their own cellmates. The inmate indicates on a designated form the inmate with whom he would like to be housed. The inmate with whom he would like to be housed initiates a similar signed request. Unless barred by any other reason, the selection is granted. An inmate may house with someone from his own race or from another race. (Exh. 5, ¶ 13.)

XXXI.

Plaintiff was formerly a member of the "Crip" gang. (Pl's Depo., p. 27: 16-24; see also Exh. 3.)

XXXII.

Plaintiff appropriately receives meals (Pl's Depo., p. 31: 1:7 and 32: 6-7), medical and mental health care (*Id.*, p. 32: 9-10 and 15-17), shelter (p. 33: 1-4), exercise, sanitation and showers (*Id.*, p. 33: 5-15).

XXXIII.

Plaintiff has never made a request to cell with a person of a different race. (*Id.*, p. 39: 2-5.)

XXXIV.

Prior to filing the lawsuit Plaintiff never mentioned to prisoner officials that he wanted to live with somebody of a different race. (*Id.*, p. 45: 9-14.) Plaintiff never filed an inmate appeal on the issues raised in his complaint. (*Id.*, p. 45: 17-18.)

XXXV.

Despite Plaintiff's belief, at no institution is "race" the "sole factor" in a housing decision. (Exh. 4, Cambra Decl., ¶ 13.) If race were to be disregarded entirely, however, there will be problems within the individual cells. These will be problems that the staff will have a difficult time in controlling. There will be fights in the cells and the problems will emanate onto the prison yards. Prison housing staff are not adequately able to deal with the problems that could arise. The cells are small, confined areas and staff cannot see into the cells without going up to them and looking inside. Inmates are capable of placing coverings over the cell windows and then staff cannot see inside at all. Inmates are confined to the cells for numerous, continuous hours. Because there are limited staff to oversee numerous cells, it would be very difficult to assist inmates if the staff were needed in several places at one time. Also, there would be an additional risk to

prison employees as staff members would be accused of "setting an inmate up" if a fight resulting in harm were to break out inside of a cell. (*Id.*)

XXXVI.

Plaintiff, as a prisoner, agrees there is racial tension in the prison. (Pl's. Depo., p. 35: 2-4.)

XXXVII.

Plaintiff contends he was transferred from a prison prior to a racial riot breaking out. Specifically, he states [referring to Calipatria State Prison]: "[i]f I would have stayed there, I would have been involved in that because you have in that because you have four facilities there and each facility went on a major riot and a lot of people got hurt and injured just based on your skin color. I'm Black, and if I was there I would been hurt." (*Id.*, p. 35: 15-23.)

XXXVIII.

Plaintiff says that racial riots occur at Lancaster. (*Id.*, p. 36: 14-19.)

CONCLUSIONS OF LAW

I

Plaintiff is not entitled to relief because he has failed to state a cause of action pursuant to Title 42, United States Code, section 1983.

II.

Plaintiff is not entitled to relief as Plaintiff has failed to demonstrate an essential element of standing.

III.

Plaintiff has failed to demonstrate a violation of his Eighth Amendment Rights by Defendants Gomez and Rowland.

IV.

Plaintiff has not been denied the Equal Protection of the law.

IV.

Plaintiff Fourteenth Amendment Constitutional rights have not been denied.

V.

Plaintiff has failed to demonstrate there was a conspiracy to violate his constitutional rights.

VI.

Plaintiff is not entitled to injunctive relief.

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VII.

Defendants housing practices with respect to initial housing into two-men cells are reasonably related to legitimate penological concerns.

VIII.

Defendants are entitled to the defense of qualified immunity.

IX.

Plaintiff is not entitled to relief because he failed to establish that a material issue of fact exists.

X.

Plaintiff has failed to state a claim for which relief may be granted against Defendant in an action brought under 42 U.S.C. section 1983, in that Plaintiff has not established that Defendant violated any of Plaintiff's federally protected constitutional rights.

XI.

Any conclusion of law deemed to be an uncontroverted fact is hereby incorporated into the findings of fact.

DATED: April 9, 2001

Appendix K

Presented By:
BILL LOCKYER
Attorney General

PAUL GIFFORD,
Senior Assistant Attorney General

SUSAN DUNCAN LEE
Supervising Deputy Attorney General

s/ Robert F. Helfand for
SARA TURNER
Deputy Attorney General

Attorneys for Defendants

DATED:

HON. CONSUELO B. MARSHALL
United States District Court Judge

APPENDIX L — DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES DATED APRIL 23, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

[Tables of Contents and Authorities Intentionally Omitted]

Defendants Cambra, Gomez, and Rowland submit the following in opposition to Plaintiff's motion for summary adjudication of issues filed April 9, 2001. Defendants

respectfully request that when considering this opposition, the Court take notice and consider Defendants' motion for summary judgment as to all issues which is also set for hearing on May 7, 2001.

PRELIMINARY STATEMENT

This is an action brought pursuant to 42 U.S.C. § 1983. Plaintiff, Garrison S. Johnson, a Level-IV, state prisoner incarcerated at the California State Prison for Los Angeles County located in Lancaster, California ("CSP-Lancaster"), contends that there has been "invidious discrimination" by the State of California Department of Corrections, its former Directors, James H. Gomez and James Rowland," alleging they are liable for "formulating and implementing a policy and practice of housing inmates based solely on their race." (Fourth Amended Compl., ¶ 1.)

Plaintiff has filed a motion for summary adjudication of his second and third claims for relief contending that Defendants violated and conspired to violate his Fourteenth Amendment right of Equal Protection of the Law.

II.

PLAINTIFF HAS MADE NO SHOWING THAT HIS CONSTITUTIONAL RIGHTS WERE OR HAVE BEEN VIOLATED BY THE DEFENDANTS.

The Equal Protection Clause of the Fourteenth Amendment provides that "no state shall make or enforce any law which shall . . . deny to any person within its

jurisdiction, the equal protection of the laws." U.S. Const., amend. XIV, § 1. The Clause "does not take from the States all power of classification," *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271 (1979), but "keeps governmental decision makers from treating differently persons who are in all relevant respects alike," *Nordlinger v. Hahn,* 505 U.S. 1, 10, (1992). *See also City of Cleburne v. Cleburne Living Ctr., Inc,* 473 U.S. 432, 440 (1985) (holding that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike").

The United States Supreme Court has held that segregation of the races in prisons and jails violates the Equal Protection Clause of the Fourteenth Amendment. The Court recognized, however, "that prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Lee v. Washington,* 390 U.S. 333, 334 (1968); *see, also, Cruz v. Beto,* 405 U.S. 319, 321 (1972) ("racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for the necessities of prison security and discipline." (internal quotation marks omitted)); *see also In re Long Term,* 174 F.3d 468 (4th Cir., 1999) ("[e]ven assuming that analogous action outside the prison context would violate the Constitution, 'when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.'" *quoting Turner v. Safley,* 482 U.S. 78, 89 (1987)).

Plaintiff contends that Defendants violated his constitutional rights in 1987, when he was initially housed

in the prison, whereby he was housed with an inmate of his own race. Plaintiff supports his position with the case of *Sockwell v. Phelps,* 20 F.3d 187 (5th Cir. 1994). There, the Fifth Circuit Court of Appeals, addressing a Louisiana prison, held that although the prison could segregate those who had engaged in racial violence, the prison's justification were generalized fears, insufficient to support segregation of all two-man cells.

First, *Sockwell* does not address the Supreme Court's holding in *Turner v. Safley* (*supra*). *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights. *See Turner,* 482 U.S. at 85 ("Our task . . . is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights'"). *Turner* set forth a new standard to evaluate all constitutional claims brought by inmates: Because "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," *Turner,* 482 U.S. at 84 (internal quotation marks omitted), the Supreme Court has held a prison regulation [that] impinges on inmates' constitutional rights . . . is valid if it is reasonably related to legitimate penological interests: *See, id.* at 89. This more deferential standard applies even when the alleged infringed constitutional right would otherwise warrant higher scrutiny. *Turner v. Safley* at 89.

In determining whether a prison policy is constitutional, the Court considers four factors: (1) whether there is a valid, rational connection between the policy and the penological

interest; (2) whether an alternative means of exercising the right remains open to prison inmates; (3) the impact accommodation of the asserted right will have on guards, other inmates, and the allocation of prison resources; and (4) the absence of ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests. *See Turner,* 482 U.S. at 89-90; *accord Mauro v. Arpaio,* 188 F.3d 1054, 1058 (9t[h] Cir.1999) (en banc).

Unlike *Sockwell,* concerns by Defendants with respect to the housing of inmates during classification are not based on "generalized fear" of racial violence. They are based on knowledge of gang rivalries predominating in high security prisons which have resulted in serious injury and death. (Exhibit 4, Excerpts of Schulteis's Deposition, pp. 58:6 - 59:4.) It is prison officials concern that gang rivals are not housed together. For example, Pelican Bay's general population is currently in a state of lockdown. Lockdowns are where inmates are essentially confined to their cells at all times and all outside-the-cell activities (generally what is known as the "programs") are suspended. This present lockdown stems from a series of racially-based, gang-related, conflicts that have erupted into riots and acts of violence on the prison yards leading to serious injury and death. (Decl.of Associate Warden O'Neill, attached as Exh. 1.) As background, on June 1, 1998, a riot occurred on the Facility A yard which involved 39 Northern and Southern Hispanic inmates. All Hispanic inmates on Facility A were locked down and, although attempts were made to lift the lockdown, the Southern Hispanic population showed no willingness to program cooperatively and continued to be locked down for over 14 months. (Exh. 1, ¶ 4.)

In August of 1999, a controlled release of Southern Hispanics inmates began which resulted in several small incidents with Northern Hispanics. At that time there were approximately three times as many Southern Hispanic inmates as there were Northern Hispanics. This numerical inequity as well as the likelihood that this violence would continue resulted in the decision to place all of the Northern Hispanic inmates into Administrative Segregation pending transfer to other institutions. (*Id.*, ¶ 5.) On March 12, 1999, a riot occurred on the Facility B yard which involved "Fresno Bulldogs" and Southern Hispanics. 90 inmates were involved. This riot resulted in the decision to stop the intake of Fresno Bulldogs at Pelican Bay. (*Id.*, ¶ 6.) On March 15, 1999, three days later, White Supremacist and "Skinheads" attacked non-affiliated [a member of no gang] Whites and Northern Hispanic inmates. 31 inmates were involved in this. (*Id.*, ¶ 7.) On March 18, 1999, just three days later, a riot occurred on the Facility A yard. Northern Hispanic inmates attacked White inmates. 39 inmates were involved in this. The inmates were placed on lockdown until April 14, 1999. (*Id.*, ¶ 8.) On August 31, 1999, a riot occurred on the B yard. Over 100 Black inmates attacked a smaller number of White inmates. (*Id.*, ¶ 9.) On September 9, 1999, a racial disturbance occurred on the Facility A yard involving 7 Black and 4 White inmates. (*Id.*, ¶ 10.) On September 27,1999, a riot occurred on the Facility A yard involving 30 Black and 3 White inmates. (*Id.*, ¶ 11.) A plan was developed on Facility A to allow the Black inmates to go to the yard and discuss amongst themselves the need for positive programming. This process was then repeated with the White inmates, and finally with both groups together. This resulted in full programing for these groups on the Facility A yard. (*Id.*, ¶ 12.) A similar

approach was attempted on the Facility B yard. Each group (Black, White, Southern Hispanic) was allowed to go to the yard and discuss their issues. Unfortunately, what followed was a series of yard releases that resulted in violence either perpetrated by the White inmates or the Black inmates. After several inmate instigators from each ethnic group were placed in Administrative Segregation, a series of successful integrated yard releases resulted. (*Id.*, ¶ 13.) On February 23, 2000, however, there was a riot on the Facility B yard involving approximately 250-300 inmates. Southern Hispanic inmates initiated a series of attacks on Black inmates. A large number of Black inmates sustained serious stab wounds and lacerations. Some of the White inmates on the yard joined the Southern Hispanics. It was necessary for staff to utilize both lethal [deadly] and non-lethal force to quell the riot. Sixteen inmates were struck with .223 rounds from Mini-14 rifles, one fatally. Twenty-five inmates were transported to outside hospitals. The institution was placed on lockdown. (*Id.*, ¶ 14.)

On March 24, 2000, Facility A inmates began to be released to the yard in segregated groups. Facility B inmates were not immediately released due to the large number or riot participants who were still housed on Facility B pending bed space availability in Administrative Segregation. (*Id.*, ¶ 15.) On August 25, 2000, information was received through intelligence that there would be further assaults. On September 1, 2000, and in light of the information, the institution was again locked down. The entire complex was searched and private interviews were conducted with every inmate. The searches revealed the discovery of 78 deadly weapons, 142 items of danger contraband and 6 "hype" kits.

At the conclusion of the search, and upon review of the information, It was apparent at this time that no options existed to bring the general population up to safe programming. All previous, reasonable attempts had failed. The findings were of continuing conflict. There was evidence of stockpiling of weapons and further and serious threat of ethnic racial conflict. This is the background of the current, continuing lockdown of the general population at Pelican Bay. (*Id.*, ¶ 16.) At this time, efforts are underway to lift the lockdown. This will done in a manner where prison officials feel it can be done safely and result in no further violence. This is a slow process. It requires major consideration of the safety of all inmates as well as staff. Every attempt thus far, however, has resulted in racially motivated violence or threats of violence. (*Id.*, ¶ 17.)

There has been no evidence produced by Plaintiff that these problems could have been avoided if he or other inmates were housed differently upon classification. As Mr. Cambra states in his declaration,

> Despite Plaintiff's belief, at no institution is "race" the "sole factor" in a housing decision. If race were to be disregarded entirely, however, I am certain, based upon my experience with CDC prisoners, that there will be problems within the individual cells. These will be problems that the staff will have a difficult time in controlling. I believe there will be fights in the cells and the problems will emanate onto the prison yards. With respect to inside individual cells, I do not feel that prison housing staff are adequately able to deal with the

problems that could arise. The cells are small, confined areas and staff cannot see into the cells without going up to them and looking inside. Inmates are capable of placing coverings over the cell windows and then staff cannot see inside at all. Inmates are confined to the cells for numerous, continuous hours. I feel that because there are limited staff to oversee numerous cells, it would be very difficult to assist inmates if the staff were needed in several places at one time. Also, I believe that there would be an additional risk to prison employees as staff members would be accused of "setting an inmate up" if a fight resulting in harm were to break out inside of a cell. (Exh. 3, ¶ 13.)

Mr. Cambra goes on, "Therefore, I feel it would be very irresponsible and I would not allow staff to compromise safety and place inmates in cells without considering these issues as being possible consequences. Because of the problems we have on the yards, which are open and easily observable areas, with respect to racial conflicts including riots, which have led to serious injury and deaths, I believe that the same problems could and will surface inside of the individual cells. I cannot recommend this compromise of safety." (Exh. 2, ¶ 14.)

Defendants have an obligation to protect inmates from potential danger. This was also not addressed by *Sockwell.* In *Farmer v. Brennan,* 511 U.S. 825 (1994), the Supreme Court held that under the Eighth Amendment, prison officials have a duty to "provide humane conditions of confinement

. . . [to] ensure that inmates receive adequate food, clothing, shelter and medical care, and [to] 'take reasonable measures to guarantee the safety of the inmates . . ." *Id.* at 831. In general, a prison official's deliberate indifference to a substantial risk of harm to an inmate violates the Eighth Amendment. *Farmer v. Brennan,* 511 U.S. 825, 827 (1994). To make out a claim of deliberate indifference to the threat of serious harm or injury by another prisoner, the plaintiff must assert that the deprivation of his or her rights was "objectively, sufficiently serious." *Farmer,* 511 U.S. at 834. Second, where the claim at issue is predicated upon the failure to protect, the deprivation is deemed to be sufficiently serious if there was a substantial risk that the prisoner would suffer serious harm. *Id.* As the declarations of Mr. Cambray, Mr. O'Neil and Ms. Schulteis (Exhibit 3) point out, they make their housing decisions with the paramount concern being safety.

The Supreme Court has consistently stated that prison administrators should receive wide-ranging deference in the adoption and execution of policies and practices that are needed to preserve the internal order and discipline of institutional security. *Bell v. Wolfish,* 441 U.S. 520 (1979). There are few cases in which the State's interest in combating the danger posed by a person to both himself and others is greater than in a prison environment, which, "by definition," is made up of persons with "a demonstrated proclivity for antisocial criminal, and often violent, conduct." *Hudson v. Palmer,* 468 U.S. 517, 526 (1984); *Washington v. Harper,* 494 U.S. 210, 224 (1990.)

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Compatability Policy

"The policy of the CDC is that inmates pick their cellmate with whom they are compatible. After an inmate leaves the reception center and goes into the prison where he will be permanently housed, double-celled inmates are able to select their own cellmates. The inmate indicates on a designated form the inmate with whom he would like to be housed. The inmate with whom he would like to be housed initiates a similar signed request. Unless barred by any other reason, the selection is granted. An inmate may house with someone from his own race or from another race." (Exh. 3, ¶ 13.) This is a policy designed around inmates finding a compatible cellmate. (*Id.*)

In this case, Plaintiffs cell-mate is Mr. Stubbs. (Pl's. Dep., p. 18:25-19:1[1]) Plaintiff cells with Mr. Stubbs because he finds they are compatible. (*Id.* at, pp. 19: 10-20: 6.) If Plaintiff found he was compatible with someone of a different race and wanted to house with that person, he could.[2] (Pl's Dep., p. 25: 11-18.) As the Director of the Department of Corrections, Mr. Cambra concurs, "[I]n my experience with the CDC, I have found that the ideal situation for a two-person cell is that an inmate finds another inmate with whom he or she is compatible and both inmates indicate to their prison housing staff of their request to be housed together. (Exh. 3, ¶ 15.)

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1. Plaintiff's deposition was lodged with the Court on April 9, 2001.

2. By his deposition testimony, Plaintiff's statement that "he could" appears to be in the context that he would be agreeable to it. (See Plaintiff's Dep. p. 25: 11-13.)

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With this policy, Plaintiff has failed to demonstrate how Defendants have violated Plaintiff's constitutional rights. Plaintiff's motion for summary adjugication of issues should be denied.

III.

THERE IS NO EVIDENCE OF A CONSPIRACY TO VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHTS

Plaintiff alleges that Defendants conspired against him. 42 U.S.C § 1985 prohibits individuals from entering into a conspiracy to deprive an individual of his civil rights. Under the clauses of section 1985, an allegation of racial or class-based animus is an essential element of the claim. *Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir.1987). To establish such animus, a plaintiff must show an "invidiously discriminatory motivation . . . behind the conspirators' action." (*Id.*, at 561)

Further, a conspiracy allegation does not give rise to section 1983 liability unless there is an actual deprivation of civil rights. *Woodrum v. Woodward* County, *Okl.*, 866 F.2d 1121, 1126 (9th Cir.1989); *Escamilla v. City of Santa Ana,* 606 F. Supp. 928, 934, *affd.*, 796 F.2d 266 (1985).

In this case, Plaintiff has not produced evidence of class-based animus. There has been no violation of a constitutional right and no facts of conduct by Defendants in furtherance of a conspiracy to violate Plaintiff's constitutional rights. Summary judgment should be granted in favor of Defendants on Plaintiff's claim of conspiracy.

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IV.

DEFENDANTS ARE NOT LIABLE IN DAMAGE TO PLAINTIFF

Defendants Gomez and Rowland are sued in their individual capacity. As to Defendant Cambra, this Defendant is sued only in his official capacity. (Fed.R.Civ.P. 25.) Insofar as Plaintiff seek to sue the CDC official or employee in their official capacities, the suit is barred by the Eleventh Amendment. *See, Pennhurst State Sch. & Hosp. v. Halderman,* 465 U.S. 89, 100 (1984) (holding that state agencies are "states" for the purposes of the Eleventh Amendment); *Regents of the University of California v. Doe,* 519 U.S. 425, 429 (1997); *see also Hafer v. Melo,* 502 U.S. 21 (1991) ("State officers sued for damages in their official capacity are not 'persons' for the purposes of the suit because they assume the identity *of* the government that employs them. By contrast, officers sued in their personal capacity come to court as individuals.") A suit for damages against a state official in his official capacity is barred by the Eleventh Amendment. *See, Pennhurst State Sch. and Hosp. v. Halderman,* 465 U.S. 89, 101 (1984).

As to damages against Defendants Gomez and Rowland, Plaintiff's complaint contains no factual allegations concerning Mr. Gomez and Mr. Rowland's personal involvement in his claim. Plaintiff has never asked either Defendant if he could cell with an inmate from another race and his request was never denied. (Plaintiff's dep. p, 39: 2-5; p. 45: 9-14; p. 45: 17-18.) A Section 1983 claim cannot be

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sustained on a theory of respondeat superior. *See Rizzo v. Goode,* 423 U.S. 362, 376-77 (1976); *Redman v. County of San* Diego, 942 F.2d 1435, 1446 (9th Cir.1991).

Moreover, Plaintiff has not demonstrated how he has been injured. *Lewis v. Casey,* 518 U.S. 343, 349 (1996), clarifies the standing requirements for a constitutional challenge by reminding the Court that "the Constitution requires a plaintiff to demonstrate actual injury in order to have a federal court adjudicate a claim and allows no exception in prison-conditions cases." *Lewis,* 518 U.S. at 349-352. The Court explained that the requirement that an inmate show "actual injury" derives from the constitutional principle of standing. *Lewis,* 518 U.S. at 349. If a claimant does not have standing, he is barred from bringing suit and the federal court is without jurisdiction to hear the claim. *See Allen v. Wright,* 468 U.S. 737, 750-52 (1984). "It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey,* 518 U.S. at p. 349. Further holding that, "it is not the role of courts, but that of political branches, to shape institutions of government in such fashion as to comply with the laws and the constitution." (*Id.*); *see also Raines v. Byrd,* 521 U.S. 811, 818 (1997) (standing requires a legally and judicially cognizable injury).

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V.

PLAINTIFF IS NOT ENTITLED TO INJUNCTIVE RELIEF

It is well established that in order to justify a grant of a permanent injunction the movant has the burden of establishing (1) that the court's exercise of equity jurisdiction is proper, *Younger v. Harris,* 401 U.S. 37, 43-44 (1971); (2) that the movant has succeeded in proving the merits of its case, *Cib-Geigy Corp. v. Bolar Pharmaceutical Co.,* 747 F.2d 844, 850 (3rd Cir. 1984); and (3) that the balance of equities tips in favor of injunctive relief. Id. The basis for injunctive relief in the federal courts is a showing of irreparable injury and the inadequacy of legal remedies. *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312 (1982).

In this case, Plaintiff does not demonstrate that he has been injured. (See discussion section IV.) In this case, the balance of the equities does not justify injunctive relief. Plaintiff is not an inmate who is being classified into the prison, rather he has been imprisoned since 1987. Plaintiff is encouraged to house with an inmate with whom he is compatible and Plaintiff has done just that. Plaintiff has never asked to house with an inmate from another race and a request has never been denied. Even if it had been denied, Plaintiff could pursue the prison's administrative remedies. There is no injunctive relief to which Plaintiff is entitled. Plaintiff s request for summary adjudication of issues should be denied.

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VI.

DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Prison officials, performing discretionary functions within the limits of their duties, receive a qualified immunity from damages in Civil Rights actions unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Procunier v. Navarette,* 434 U.S. 555, 561-562, 98 S. Ct. 855 (1978); *Harlow v. Fitzgerald,* 457 U.S. 800, 818-819, 102 S. Ct. 2727 (1982). The purpose of this rule is to permit such officials to undertake their responsibilities without fear that they will be held liable in damages for actions that appear reasonable at the time but are later held to violate statutory or constitutional rights. *Id.* at 819; *Kraus v. County of Pierce,* 793 F.2d 1105, 1108 (9th Cir. 1986). "As the qualified immunity defense has evolved, it provides ample protection for all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341, 106 S. Ct. 1092 (1986). An official is denied qualified immunity only if the law was clearly established and a reasonable official could not have believed that his conduct was lawful. *Somers v. Thurman,* 109 F.3d 614, 617 (9th Cir. 1997).

Thus, in deciding whether an official is entitled to qualified immunity, the court must inquire: (1) whether the law governing the officials' conduct was clearly established at the time of the alleged violation; and (2) under the law, whether a reasonable official could have believed the conduct did not violate an identifiable right. *See Act Up!/Portland v.*

Bagley, 988 F.2d 868, 871-72 (9th Cir.1993). The inquiry focuses on whether a reasonable official in the position of any of the defendants could have believed that his conduct in question was lawful. *See id*, at 872. Additionally, the Ninth Circuit has stated that,

> The question of whether a reasonable [official] could have believed [that his conduct was lawful] is 'an essentially legal question' . . . that should be determined by the district court at the earliest possible point in the litigation. Where the underlying facts are undisputed; a district court must determine the issue on motion for summary judgment.

See id., at 873 (citation onutted).

In this case, there was no violation of a clearly established law. Moreover, Defendants could have reasonably believed that their conduct was lawful under the established legal principles. Under *Lee v. Washington*, 390 U.S. 333, 334 (1968) prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." In this case, there is no evidence that Defendants have acted otherwise. Thus, Defendants are entitled to qualified immunity. *See Act Up!/Portland*, 988 F.2d at 871-72.

CONCLUSION

Based on the foregoing, Plaintiff's Motion for Summary Adjudication of issues should be denied and summary judgment should be granted in favor of Defendants Rowland, Gomez and Cambra and against Plaintiff.

DATED: April 23, 2001

BILL LOCKYER
Attorney General

PAUL GIFFORD
Senior Assistant Attorney General

SUSAN DUNCAN LEE
Supervising Deputy Attorney General

/s/ Sara Turner
SARA TURNER
Deputy Attorney General

Attorneys for Defendants

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EXHIBIT 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants,

DECLARATION OF PELICAN BAY STATE PRISON ASSOCIATE WARDEN B. O'NEILL

I, B. O'NEILL, declare as follows:

1. I am employed with the California Department of Corrections (the "CDC") and have been so employed for 21 years. Presently, I am an Associate Warden at Pelican Bay State Prison ("Pelican Bay").

2. One of my duties involves overseeing the "general population" yards at Pelican Bay. The general populations yards include the Facility A and B yards, which house several thousand level-IV inmates.

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3. Pelican Bay's general population is currently in a state of lockdown. Lockdowns are where inmates are essentially confined to their cells at all times and all outside-the-cell activities (generally what is known as the "programs") are suspended. This present lockdown stems from a series of racially-based, gang-related, conflicts that have erupted into riots and acts of violence on the prison yards leading to serious injury and death. At the request of the Office of the Attorney General, and in preparation for this declaration, I reviewed my synopsis of the history of his lockdown that I previously prepared as briefing for the Warden.

4. As background, On June 1, 1998, a riot occurred on the Facility A yard which involved 39 Northern and Southern Hispanic inmates. All Hispanic inmates on Facility A were locked down and, although attempts were made to lift the lockdown, the Southern Hispanic population showed no willingness to program cooperatively and continued to be locked down for over 14 months.

5. In August of 1999, a controlled release of Southern Hispanics inmates began which resulted in several small incidents with Northern Hispanics. At that time there were approximately three times as many Southern Hispanic inmates as there were Northern Hispanics. This numerical inequity as well as the likelihood that this violence would continue resulted in the decision to place all of the Northern Hispanic inmates into Administrative Segregation pending transfer to other institutions.

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6. On March 12, 1999, a riot occurred on the Facility B yard which involved "Fresno Bulldogs" and Southern Hispanics. 90 inmates were involved. This riot resulted in the decision to stop the intake of Fresno Bulldogs at Pelican Bay.

7. On March 15, 1999, three days later, White Supremacist and "Skinheads" attacked non-affiliated [a member of no gang] Whites and Northern Hispanic inmates. 31 inmates were involved in this.

8. On March 18, 1999, just three days later, a riot occurred on the Facility A yard. Northern Hispanic inmates attacked White inmates. 39 inmates were involved in this. The inmates were placed on lockdown until April 14, 1999.

9. On August 31, 1999; a riot occurred on the B yard. Over 100 Black inmates attacked a smaller number of White inmates.

10. On September 9, 1999, a racial disturbance occurred n the Facility A yard involving 7 Black and 4 White inmates.

11. On September 27,1999, a riot occurred on the Facility A yard involving 30 Black and 3 White inmates.

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12. A plan was developed on Facility A to allow the Black inmates to go to the yard and discuss amongst themselves the need for positive programming. This process was then repeated with the White inmates, and finally with both groups together. This resulted in full programing for these groups on the Facility A yard.

13. A similar approach was attempted on the Facility B yard. Each group (Black, White, Southern Hispanic) was allowed to go to the yard and discuss their issues. Unfortunately, what followed was a series of yard releases that resulted in violence either perpetrated by the White inmates or the Black inmates. After several inmate instigators from each ethnic group were placed in Administrative Segregation, a series of successful integrated yard releases resulted.

14. On February 23, 2000, there was a riot on the Facility B yard involving approximately 250-300 inmates. Southern Hispanic inmates initiated a series of attacks on Black inmates. A large number of Black inmates sustained serious stab wounds and lacerations. Some of the White inmates on the yard joined the Southern Hispanics. It was necessary for staff to utilize both lethal [deadly] and non-lethal force to quell the riot. Sixteen inmates were struck with. 223 rounds from Mini-14 rifles, one fatally. Twenty-five inmates were transported to outside hospitals. The institution was placed on lockdown.

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15. On March 24, 2000, Facility A inmates began to be released to the yard in segregated groups. Facility B inmates were not immediately released due to the large number or riot participants who were still housed on Facility B pending bed space availability in Administrative Segregation.

16. On August 25, 2000, information was received through intelligence that there would be further assaults. On September 1, 2000, and in light of the information, the institution was again locked down. The entire complex was searched and private interviews were conducted with every inmate. The searches revealed the discovery of 78 deadly weapons, 142 items of danger contraband and 6 "hype" kits. At the conclusion of the search, and upon review of the information. It was apparent at this time that no options existed to bring the general population up to safe programming. All previous, reasonable attempts had failed. The findings were of continuing conflict. There was evidence of stockpiling of weapons and further and serious threat of ethnic racial conflict. This is the background of the current, continuing lockdown of the general population at Pelican Bay.

17. At this time, efforts are underway to lift the lockdown. This will done in a manner where prison officials feel it can be done safely and result in no further violence. This is a slow process. It requires major consideration of the safety of all inmates as well as staff. Every attempt thus far, however, has resulted in racially motivated violence or threats of violence.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of April, 2001, at Crescent City, California.

s/ Barry O'Neill
Barry O'Neill, ASSOCIATE WARDEN
PELICAN BAY STATE PRISON

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EXHIBIT 2

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

DECLARATION OF S. CAMBRA IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Steven Cambra, declare as follows:

1. I am employed with the California Department of Corrections (the "CDC") and have been so employed for 30 years. Presently, I am the acting Director of Corrections.

2. In addition to serving as the Director of the Department of Corrections, I have served as a Regional Administrator for the CDC. In addition to

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these capacities, I have served as a Warden, an Associate Warden, a Captain, Lieutenant, Sergeant and Correctional Officer.

3. I have worked with inmates in all housing security levels. As the Regional Administrator, I oversaw the prison institutions within my Region. As the Acting Director, I oversee all of the prisons.

4. I am familiar with the CDC's policies and practices with respect to housing decisions. Inmates are housed double-celled (two inmates per cell) or in dormitories. With respect to double-celling, a critical goal on the part of prison officials is that this be done in a manner to maintain the inmates' individual safety as well as the safety of the staff and the institution as a whole.

5. An initial housing decision is one that is made as soon as the inmate arrives at the institution after being sentenced. This initial housing institution is called a reception center. Upon an inmate's arrival to a reception center, particularly if he has never been housed in any CDC facility, CDC has only limited information about the inmate. The inmate then goes through a classification process. It is during this process that an evaluation is done as to his physical, mental and emotional health. Also discussed during this time are vocational and educational goals, and the inmate is given a battery of tests.

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6. The inmate's history in jail and any previous commitments are reviewed to begin to determine his security needs and classification level. The inmate is also given written documentation and orientation materials. Also, if an inmate has a disability, CDC evaluates his needs with respect to that disability. CDC looks at whether or not the inmate has enemies in the prison, such as people who testified against him in the past or in his criminal case, co-defendants, inmates who he may have had disputes with during previous prison placements.

7. With respect to initial double-cell housing placement, CDC looks at several factors. These include, but are not limited to, gender, age, classification score, case concerns, custody concerns, mental and physical health, enemy situations, gang affiliation, background, history and custody designation.

8. In addition to the factors identified in paragraph 7, above, race is considered during the initial double-cell housing classification decision.

9. The reason race is a consideration in an initial housing decision is, based on CDC's experience, that CDC finds that prisoners make this out to be an important issue. The reason CDC has found that inmates believe race to be an important issue stems from the identification that prisoners, particularly male prisoners, make of themselves. The second reason CDC finds that male prisoners make this out

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to be an important issue stems from the gang involvement that is a part of many of the inmates' backgrounds and is generally found to play a role in those inmates' anti-social, criminal behavior.

10. Therefore, when an inmate arrives at a CDC facility, if not required to be single-celled or able to be housed in a dormitory, he is generally initially, housed double-celled with an inmate of his own ethnic race. If the inmates indicate they are not able to get along with their cellmate, then prison officials evaluate this complaint and either continue their housing situation or house them with someone else.

11. If any inmate feels that his housing situation or cellmate poses a danger to his safety, then he is rehoused.

12. After the orientation period (which typically takes around 60 days), the inmate is either retained at the institution as his permanent housing or is transferred to the institution where the classification representatives determine he would be most suited. If he is to be housed at another institution, then the inmate will go through a housing screening process. In fact, every time an inmate is transferred, his housing and status requirements are evaluated prior to cell placement.

13. Despite Plaintiff's belief, at no institution is "race" the "sole factor" in a housing decision. If race were to be disregarded entirely; however, I am certain,

based upon my experience with CDC prisoners, that there will be problems within the individual cells. These will be problems that the staff will have a difficult time in controlling. I believe there will be fights in the cells and the problems will emanate onto the prison yards. With respect to inside individual cells, I do not feel that prison housing staff are adequately able to deal with the problems that could arise. The cells are small, confined areas and staff cannot see into the cells without going up to them and looking inside. Inmates are capable of placing coverings over the cell windows and then staff cannot see inside at all. Inmates are confined to the cells for numerous, continuous hours. I feel that because there are limited staff to oversee numerous cells, it would be very difficult to assist inmates if the staff were needed in several places at one time. Also, I believe that there would be an additional risk to prison employees as staff members would be accused of "setting an inmate up" if a fight resulting in harm were to break out inside of a cell.

14. Therefore, I feel that not considering race in an initial housing decision would be very irresponsible and I would not allow staff to compromise safety and place inmates in cells without considering these issues as being possible consequences. Because of the problems we have on the yards, which are open and easily observable areas, with respect to racial conflicts including riots, which have led to serious injury and deaths, I believe that the same problems could and will surface inside of the individual cells. I cannot recommend this compromise of safety.

15. In my experience with the CDC, I have found that the ideal situation for a two-person cell is that an inmate finds another inmate with whom he or she is compatible and both inmates indicate to their prison housing staff of their request to be housed together. In light of this goal, I would not recommend that race not be considered in the initial housing decision.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9 day of April 2001, at Sacramento, California.

s/ Steven Cambra
STEVEN CAMBRA, DIRECTOR (A)
CALIFORNIA DEPARTMENT
OF CORRECTIONS

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EXHIBIT 3

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV -95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants,

DECLARATION OF L. SCHULTEIS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Linda Schulteis, declare as follows:

1. I am employed with the California Department of Corrections (the "CDC") and have been so employed for twenty-four years. Presently, I am an Associate Warden at the California State Prison for Los Angeles County located in Lancaster ("CSP-Lancaster").

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2. In addition to serving as an Associate Warden, I have served as a Captain Lieutenant, Sergeant and Correctional Officer.

3. In my present capacity as an Associate Warden, among my duties, I oversee the Receiving and Release ("R & R") section of CSP-Lancaster and am responsible for the aspect of the prison which assigns inmates to cells upon initial arrival at this institution.

4. CSP-Lancaster is a high security, Level III and IV prison. When inmates are received into the prison, it is essential that they are promptly assigned a bed. A report generated by the Control Sergeants indicates which beds are currently empty.

5. If the inmate will be housed in a double-cell, the initial housing is done by generally housing an inmate with another inmate of his same ethnic race. In addition, we also look at any prison or street gang affiliation and make every attempt not to house inmates with members of what could be considered a rival gang or rival disruptive group.

6. We also try to house an inmate with an inmate close to his own age. Also, for example, we attempt to assign non-smokers with non-smokers, and vice versa to alleviate complaints about smoking odors on property or clothing. We also consider other factors such as, but not limited to, enemy concerns, custody level and classification.

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7. We make housing decisions in the manner described above because we have found that it will be the least likely to lead to conflict among the prisoners within their respective individual housing unit (cell) as well as resulting in the least amount of conflict among the prisoners when they are all out together on the yard.

8. With respect to those inmates that qualify to live in dormitory housing, inmates of all races are housed together. We attempt to balance the number of inmates within each race in the dormitories in order to avoid the possibility of racially based conflict, which has occurred in the past

9. As to jobs, meals, yard and recreation time, vocational and educational assignments, inmates from all races participate together.

10. However, as to the initial housing assignment, if we were not to consider race and gang affiliation in the initial double-cell housing decision, I am certain that there will be conflicts both in the cells and the conflict will flow onto the yards. Although we would rather the inmate population not focus on these areas in a manner leading to conflict, we find that the inmates do place a weight on the issue. I believe this focus is because of the manner in which prison inmates identify themselves both before and after they have been sent to prison and because inmates spend very long hours in small cells.

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11. At CSP-Lancaster, if we were to disregard the initial housing placement being done in the manner set forth in paragraph five, then I am certain there would be serious violence among inmates. I have worked in five different CDC institutions and this would be true for all of them.

12. I am therefore not willing to knowingly disregard the factors and place an inmate into jeopardy and would not compromise an inmate or group of inmates safety by taking steps that I know would result in violence and conflict. My responsibility is to preserve the safety and security of the institution, inmates and staff and given that responsibility, I would therefore not ignore a known issue impacting safety.

13. After an inmate leaves the reception center and goes into the prison where he will be permanently housed, double-celled inmates are able to select their own cellmates. The inmate indicates on a designated form the inmate with whom he would like to be housed. The inmate with whom he would like to be housed initiates a similar signed request. Unless barred by any other reason, the selection is granted. An inmate may house with someone from his own race or from another race.

14. This is a policy designed around inmates finding a compatible cellmate. We get hundreds of these requests and almost all are granted This policy has compatibility as the goal, and it operates effectively,

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is encouraged and results in the lowest potential for conflict or violence among the inmates which is the desired goal of prison administrators.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6 day of April, 2001, at Sacramento, California.

s/ L. Schulteis AW
L. SCHULTEIS, ASSOCIATE WARDEN
CSP-LANCASTER

Appendix L

EXHIBIT 4

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

NO. CV-95-01192-CBM (BOR)

GARRISON S. JOHNSON, AN INDIVIDUAL,

PLAINTIFF,

VS.

STATE OF CALIFORNIA; JAMES H GOMEZ; AN INDIVIDUAL; JAMES ROWLAND, AN INDIVIDUAL; AND DOES 1 THROUGH 20, INCLUSIVE,

DEFENDANTS.

DEPOSITION OF: LINDA SCHULTEIS

TAKEN ON: WEDNESDAY, DECEMBER 6, 2000

CERTIFIED COPY

Q. I'D LOVE TO ASK MORE QUESTIONS ABOUT THAT, BUT I'M AFRAID IT WOULD BE HIGHLY IRRELEVANT TO THIS CASE.

MS. TURNER: PROBABLY NOT.

BY MR. HILGER:

Q. HOW ABOUT THE NAZI LOW RIDERS?

A. ALL OF THE GANG FACTIONS PLAY A PART IN THE PRISON CULTURE, WHICH IS WHY WE HAVE TO CAREFULLY PLACE INMATES IN CELLS WITH EACH OTHER. A LOT OF THE GANG CULTURE IS THAT DO NOT TALK TO STAFF. DON'T TELL THEM WHAT YOU'RE ABOUT OR WHAT'S HAPPENING. SO STAFF HAVE TO BE VERY PERCEPTIVE. AND OUR PRACTICE OF PUTTING — YOU KNOW, MATCHING RACES IN A CELL PREVENTS MORE PROBLEMS THAN IT STARTS.

Q. OKAY. ISN'T IT TRUE, THOUGH, THAT IF YOU PUT A BLACK WITH A WHITE, THERE'S NO CHANCE OF THEM BEING FROM RIVAL GANGS?

A. THEY COULD BE FROM RIVAL GANGS. LIKE IF YOU PUT A BGF IN WITH AN ARYAN BROTHERHOOD, SOMEBODY WILL DIE.

Q. WHEN THEY GET THIS INITIAL LIST, THE 135, THERE'S NO GANG AFFILIATION INFORMATION ON THAT LIST?

A. NO, THERE IS NOT.

Q. WHEN DO THE PRISON OFFICIALS FIND OUT ABOUT THE GANG AFFILIATION?

A. RIGHT THERE IN R & R. IT IS THE RESPONSIBILITY OFF DUTY HOURS FOR THE SERGEANT OR THE SUPERVISOR THAT'S ON DUTY OUT OF THE WATCH TO REVIEW THE FILE, TO REVIEW WHAT WE CALL AN 812, THE CDC-812 TO SEE IF THERE IS ANY GANG AFFILIATION.

Q. AND IF THERE IS, THEN THAT'S TAKEN INTO ACCOUNT IN THE HOUSING ASSIGNMENT?

A. THAT'S FIRST AND FOREMOST.

Q. BUT ONLY FOR CELLS? NOT FOR DORMS?

A. WE WOULDN'T PUT A VALIDATED GANG ASSOCIATE OUT INTO ANY OF THE DORMS.

MS. TURNER: DO YOU HAVE ANY THAT ARE VALIDATED HERE?

BY MR. HILGER:

Q. I'M SORRY. WHAT DOES VALIDATED MEAN?

A. IT HAS HAPPENED.

WHERE IN THEIR FILE THEY'RE LISTED AS A VALIDATED ASSOCIATE.

Q. WHO MAKES THAT DETERMINATION?

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A. THE GANG INVESTIGATOR, THE LIEUTENANT. AND IT HAS HAPPENED. IT HAS HAPPENED. WE RECEIVED AN INMATE WHO WAS A VALIDATED MEXICAN MAFIA ASSOCIATE FROM THE MEDIUM CORRECTIONAL FACILITY. THE PAPERWORK HAS TO GO THROUGH A SCRUTINY UP THROUGH SACRAMENTO UP THERE SSU.

Q. WHAT IS SSU?

A. SPECIAL SECURITY UNIT.

APPENDIX M — MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATED APRIL 23, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV 95-1192-CBM (BQR)

GARRISON JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al,

Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

[Filed concurrently with (1) Motion to Strike Based on Evidentiary Objections, and (2) Response to Statement of Uncontroverted Fact and Statement of Genuine Issues]

Hon. Consuelo B. Marshall

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

[Tables of Contents and Authorities Intentionally Omitted]

Appendix M

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

There is a terrible and invalid assumption that permeates all of the Defendants' summary judgment papers: that all members of a particular race will act in the same manner when confronted with similar circumstances. Defendants rely freely on this racial branding while admitting to a policy of segregating new inmates by funneling them into double cells with inmates of the same race. When applied to an African-American inmate such as the Plaintiff, Defendants' policy is based on the fear that all black prisoners would become violent if initially assigned to a cell with a non-black prisoner.

In moving for summary judgment, Defendants attempt to justify their policy by pointing out that it is applied to all inmates regardless of race (i.e., whites are also housed only with whites). See Defendants' Memo. at p. 13:21-25. Thus, Defendants ask this court to support a "separate but equal" policy of race-based segregation, an anachronistic doctrine first permitted by *Plessy v. Ferguson*, 163 U.S. 537 (1896), but long ago stricken down by the Supreme Court in *Brown v. Board of Education*, 347 U.S. 483 (1954). Defendants attempt to rationalize their stance based on the factually unsupported assertion that such a policy is necessary to ensure safety. However, this same claim has been consistently rejected by the courts, and was eloquently dealt with by a Nebraska district court in an early decision which prohibited racial segregation in a prison facility:

> Threats of recalcitrant prisoners whose racial prejudices are erected to defy the constitutional

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> rights of black prisoners need to be quashed. The prisoners who threaten violence, rather than those who seek their right to nondiscriminatory treatment, should be the ones to feel the weight of the consequences of their overt bigotry.

McClelland v. Sigler, 327 F. Supp. 829, 834 (D. Neb. 1971), *affirmed* 456 F.2d 1266 (8th Cir. 1972). *Accord Sockwell v. Phelps*, 20 F.3d 187, 191 (5th Cir. 1994) (holding policy of segregating two-man cells unconstitutional despite a claimed potential for violence, finding that "[i]f violent disruptions did occur, we would expect the prison officials to take appropriate action against the offending prisoners, black or white."). Defendants have presented no credible or legitimate evidence that their policy of racial segregation creates a safer environment or supports any legitimate penological interest. Lacking any evidentiary support, Defendants' policy is invalid under the equal protection clause of the Fourteenth Amendment.

Defendants' remaining arguments are similarly flawed. Plaintiff has standing to bring these claims because in governmental segregation cases it is enough to show that the plaintiff uses the facilities at issue. *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *affirmed* 390 U.S. 333 (1968). With respect to Plaintiff's conspiracy claim, the declarations and deposition testimony speak loudly to demonstrate an agreement among the Defendants to deprive Plaintiff of his civil rights based on an invidious intent to discriminate -- at a minimum, there is a triable issue of fact on this point. Injunctive relief is not only proper, but necessary here to ensure that the Defendants discontinue a policy that violates

the Constitution. Plaintiff will demonstrate at trial in support of his Eighth Amendment claim that Defendants' policy has fostered an environment of racial hostility and increased racial animus that has subjected Plaintiff to an excessive level of violence among inmates which, in turn, has jeopardized Plaintiff's personal safety. Finally, Defendants' claim to qualified immunity must be rejected, as it has been in all other recent decisions involving racial segregation in prisons, because the law prohibiting such segregation in prisons has been clear and well established for many years. Defendants' motion should be denied in its entirety.

II. PLAINTIFF HAS STANDING TO SEEK RELIEF FOR FORCED SEGREGATION IN CELL ASSIGNMENTS

In cases involving racial segregation in prisons, residents of the affected facility plainly have standing to complain about such a practice. Specifically, the Supreme Court affirmed a district court decision in *Washington v. Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), holding that one white and five black citizens who were, or had been, incarcerated in an Alabama facility had standing to sue for violations of their rights under the Eighth and Fourteenth Amendments. The plaintiffs in Lee asserted that the statutes enacted by the Alabama Legislature "requiring segregation by race in the state, county and city penal facilities" were unconstitutional. *Id.* at 329.

The defendants in *Lee* contended that two of the plaintiffs did not have standing because they were no longer incarcerated. The Court disagreed: "The general standing requirement in cases involving governmental segregation is

that the plaintiffs must show past use of the facilities, where feasible, and a right to, or a reasonable possibility of future use." *Id.* at 329 (citation omitted). In order to challenge a practice of racial discrimination in the prison, the plaintiffs were required to show only that "the operation of these institutions, as that operation presently exists, '[permits] the recurrence of comparable violations.'" *Id.* at 330 (quoting *Henderson v. United. States*, 339 U.S. 816 (1950) (alteration in original). Certainly, if the plaintiffs in Lee had standing where they were no longer incarcerated, then Plaintiff here has an even greater right to challenge an unconstitutional practice of racial segregation.

Similarly, in *McClelland*, 327 F. Supp. at 829-30, two plaintiffs incarcerated in the Nebraska Penal and Correctional Complex filed a complaint alleging violation of their civil rights because blacks were systematically excluded from being housed in one of the two housing cells. The court held that the plaintiffs, one white and the other black, had standing because "both have resided in the general living units but [the black plaintiff] has never been permitted to reside in the East Cell House" (the cell from which blacks were excluded). *Id.* at 835. The court did not need to examine whether the black plaintiff had in fact requested to be housed in the East Cell House.

Defendants claim that Plaintiff is unable to demonstrate he has been harmed because "Plaintiff does not indicate that, because of his race, he has received any lesser or greater privileges or benefits than any other inmate." Defendants' Memo at p. 9:25 -10:1. Defendants' "separate but equal" argument, that so long as all inmates are similarly segregated

by race in double cells then Plaintiff cannot complain of injury stemming from disparate treatment, is not only flagrantly unconstitutional, it is preposterous. The fact that Plaintiff s injury is shared by all minority inmates is not a basis to deny standing.[1]

---

1. In addition, Plaintiffs ongoing psychological injury resulting from racial segregation as a basis for standing should be unquestioned in the aftermath of *Brown v. Board of Education*, in which the Supreme Court noted the injury necessarily flows from racial segregation:

> To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:
>
> > "Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn."

Brown, 347 U.S. at 493-94 (quoting from the district court in *Brown*, 98 F. Supp. 797). Here, as in *Brown*, Plaintiff's exposure to state sanctioned racial stereotyping is sufficient injury to confer standing. At a minimum, Plaintiff's ability to be rehabilitated is being interfered with by such a policy. *See McClelland v. Sigler*, 327

(Cont'd)

Lewis v. Casey, 518 U.S. 343 (1996), cited by the Defendants, held that prisoners had no actual injury in being denied access to the courts as a result of the prison facility maintaining an inadequate law library. *Lewis* does not examine any claim of racial segregation or injuries stemming from such claims, and provides no support for Defendants' argument on standing. Plaintiff has standing to bring these claims, and Defendants' motion for summary judgment on this basis should be denied.

III. DEFENDANTS' ADMITTED POLICY OF USING RACE-BASED ASSUMPTIONS IN MAKING INITIAL CELL ASSIGNMENT DEMONSTRATES THAT PLAINTIFF IS ENTITLED TO JUDGMENT ON HIS FOURTEENTH AMENDMENT CLAIM AS A MATTER OF LAW

The United States Supreme Court has plainly — and repeatedly — held that "racial segregation, which is unconstitutional outside prisons, is unconstitutional within prisons, save for the necessities of prison security and discipline." *Lee*, 390 U.S. at 334; *Cruz v. Beto*, 405 U.S. 319, 321 (1972) (also holding that prison authorities may only segregate in "particularized circumstances" of racial tension). In the face of this unwavering principle, Defendants'

(Cont'd)

F. Supp. at 831 ("[t]hat the setting is a state penal complex, rather than a state school, affords no ground for a materially different effect"); *see also*, *Ybarra v. City of San Jose*, 503 F.2d 1041, 1044 (9th Cir. 1974) (plaintiffs complaining of racial segregation in schools had standing based on causal relationship between "the injury," school segregation, and discriminatory zoning ordinances).

sole excuse for their undisputed policy of segregation is that such a policy is necessary to preserve security and discipline in California prisons. Defendants' arguments lack merit for two reasons: (1) they are based on nothing more than unfounded and conclusory suppositions which hold no evidentiary weight; and (2) they are contrary to well-established precedents that racial segregation in prisons is unconstitutional.

A. Defendants Supply No Rational Basis For Their Policy of Racial Segregation.

Defendants have offered this Court no definitive, reliable evidence that their automatic segregation of new prisoners by race is justified by legitimate security or disciplinary concerns. Defendants, instead, rely on the conclusory declarations of two prison administrators, who offer nothing more than conjecture and supposition that having integrated double cells would promote racial violence.[2] Neither of Defendants' declarants support their testimony with any statistical studies, expert analysis, data from other prison systems which have integrated prisoners, or even any fact-based anecdotal experience from California prisons. Instead, their conclusions are based solely on their personally held beliefs. But these beliefs should be viewed by the court as profoundly unreliable given their deposition testimony admitting that, for the past 24 years during which California has segregated its double person cells, neither of these

2. Plaintiff's Motion to Strike Based on Evidentiary Objections to Declarations and Exhibits Offered in Support of Defendants' Motion for Summary Judgment ("Motion to Strike") is filed concurrently with this Opposition.

administrators has any experience showing that a racially integrated cell has caused prison violence. *See*, *e.g.*, Motion to Strike at 6-11, directed at ¶¶ 13-15 of the Declaration of Steven Cambra ("Cambra Decl."); and Motion to Strike at 11, 13, 15, 16, and 18, directed at ¶¶ 7, 10, 11, 12 and 14 of the Declaration of Linda Schulteis ("Schulteis Decl."). Nearly identical testimony and lack of proof served as the basis for granting injunctive relief in *Stewart v. Rhodes*, 473 F. Supp. 1185 (S.D. Ohio 1979), discussed in detail *infra*. The declarants' suppositions that state prisoners prefer to be segregated are also made without any factual support and are equally conclusory. (*See*, *e.g.*, Motion to Strike at 3, directed at Cambra Decl., ¶ 9; and Motion to Strike at 14, directed at Schulteis Decl., ¶ 10.)[3]

Defendants admit that prisoners are integrated in dormitories without a pattern of racial violence. (*See*, *e.g.*, Schulteis Decl., ¶ 8.) Defendants also admit that they have existing mechanisms available to them whereby individual prisoners who express incompatibility with their cell mates, or who believe their cell mates pose a danger to their safety,

3. Indeed, courts have not hesitated to reject conclusory affidavits submitted by prison officials which over-generalize prisoners' thoughts or the legitimacy of certain prison regulations. *See*, *e.g.*, *Turiano v. Schnarrs*, 904 F. Supp. 400, 406-407 (M.D. Pa. 1995) (striking prison officials' conclusory affidavits of prisoners' thoughts, holding that "the personal knowledge requirement [of F. R. Civ. Proc. Rule 56(e)] means that affidavits must be devoid of hearsay, *conclusory language and statements which purport to examine thoughts as well as actions*") (emphasis added); and *Weaver v. Jago*, 675 F.2d 116, 118 (6th Cir. 1982) (rejecting as conclusory prison officials' unsupported affidavit that prison's hair length regulations are necessary for security, hygiene and safety).

may request transfers to other cells. (*See*, *e.g.*, Cambra Decl., ¶¶ 10-11; and Schulteis Decl., ¶¶ 13-14.) In fact, defendants admit that, even with segregation, Defendants "get hundreds of these [transfer] requests," which are routinely granted. (Schulteis Decl., ¶ 14.) Defendants cannot deny that these very same procedures could be used to cure *individual* instances of racial conflict among integrated cell mates. Therefore, a blanket segregation of prisoners based on race is unnecessary, unconstitutional and inexcusable.[4]

Defendants repeatedly point to the "other factors" that they use in making initial cell assignments as a means to argue, presumably, that race is merely one of several factors. But it is clear from Defendants' memorandum (e.g., at p. 15:11-13) and testimony (e.g., Schulteis Decl., ¶5) that race is a predominant and deciding factor. The fact that gang affiliation, security risk, and other factors are also considered by the Defendants does not support an argument that racial stereotyping is necessary in making safe cell assignments; to the contrary, the presence and consideration of these other factors demonstrates that other criteria is available to the prison administrators, having nothing to do with race, which assists in avoiding violent conflict within the double cells. Yet, Defendants persist in segregating these cells based on race and ethnicity.

---

4. Defendants' assertion that racial integration is not feasible because double cells are more difficult to monitor, (Cambra Decl., ¶ 13), begs the question, as those same difficulties presently exist in segregated cells. The problem is not with the prisoners' races, but either in the design of the cells or Defendants' monitoring capabilities and procedures.

Given Defendants' apparent inability to support their motion with admissible evidence, Defendants' motion for summary judgment must fail.

B. Defendants' Use of Race-based Criteria to Segregate Prisoners Has Uniformly Been Held Unconstitutional.

Following the Supreme Court's decision in *Lee*, *supra*, courts have almost invariably refused to permit segregated prison housing, and have only allowed segregation in particularized instances where segregation of individual prisoners has been shown to be necessary by prison authorities. *See*, *e.g.*, *Blevins v. Brew*, 593 F.Supp 245, 248 (W.D.Wisc.1984) (holding that the "prison security and discipline exception is a narrow one").

However, no court has held that blatant, broad-based racial segregation, of the type Defendant has admitted to, is constitutional. Case after case has ruled that this type of racial discrimination violates the Fourteenth Amendment. *Blevins*, 593 F.Supp. at 248 (double celling of inmates based on race violated plaintiff's constitutional right to equal protection under the law); *Sockwell*, 20 F.3d at 187 (general policy of segregating two-person cells based upon race violated equal protection); *Lamar v. Kern*, 349 F.Supp. 222, 224 (S.D.Tex.1972) (system where one wing of a prison is consistently filled with black prisoners is not a color-blind system and, therefore, violates the Equal Protection Clause of the Fourteenth Amendment); *McClelland*, 327 F.Supp. at 830 (segregated prison facility violated the Fourteenth Amendment notwithstanding testimony of prison officials

that disturbances would accompany desegregation); *United States v. Wyandotte County*, 480 F.2d 969, 971-972 (10th Cir.1973) *cert. denied Wyandotte County v. United States*, 414 U.S. 1068 (segregation of blacks to East tank and whites to West tank violated the Fourteenth Amendment, noting that "[t]he argument that desegregation of public facilities might provoke violence has never been accepted to justify unconstitutional segregation").

When a prison regulation impinges on inmates' constitutional rights, as here, the regulation is invalid unless the regulation is shown to be reasonably related to a legitimate penological interest. *Turner v. Safley*, 482 U.S. 78, 89 (1987). Under *Turner*, four factors are relevant: First "there must be a 'valid, rational connection' between the prison regulation and the legitimate [and neutral] governmental interest put forward to justify it." If the connection between the regulation and the asserted goal is "arbitrary or irrational," *then the regulation fails*. *Id*. at 89-90.

Only if the policy or regulation passes this first test, should the court consider three other factors: (1) the existence of alternative means for prisoners to exercise the asserted constitutional right; (2) the impact that accommodation of the asserted right will have on guards, other inmates and on the allocation of prison resources generally; and (3) the absence of ready alternatives. *Id*.

1. Defendants Have Failed to Establish any Rational Connection Between Racially Segregated Cells and Prison Violence that would Justify The Use of Race-Based Criteria in Cell Assignments.

The justifications for racial segregation advanced by Ms. Schulteis and Mr. Cambra on behalf of the CDC are virtually identical to the explanations given by the wardens, and rejected by the courts, in *Sockwell*, 20 F.3d 187 and *Stewart*, 473 F.Supp. 1185.

In *Sockwell*, the Court of Appeals for the Fifth Circuit expressly held that a general policy of racially segregating two-person cells at the Angola penitentiary violated the prisoners' rights to equal protection, despite the warden's contention that security and discipline concerns demanded such segregation. The Court explained that "a generalized or vague fear of racial violence is not a sufficient justification for a broad policy of racial segregation. . . . If violent disruptions did occur [as a result of cell housing integration,] we would expect the prison officials to take appropriate action against the prisoner, black or white." *Sockwell*, 20 F.3d at 191.

In *Stewart*, the Ohio prison administrators asserted, as Defendants do here, that the practice of segregation is justified by "the prison administration's desire to reduce the possibility of racial tension and potential violence which it fears will result from celling black and white inmates together. . . . [Because [the prison] is the initial reception center, . . . the administration has insufficient information

concerning the [prisoner's] background to integrate them in the two-man reception cells where officials fear racial bias might flair into violence." *Stewart*, 473 F. Supp. at 1187-88. The *Stewart* court rejected that rationalization, and held that it violated the Constitution:

> [I]t is equally clear that prisoners are not stripped of all constitutional rights at the prison gate. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). The Court must strike a proper balance. . . . Although defendants contend that . . . the practice of segregation . . . [is] necessary for institutional security, the Court is not persuaded that such measures are in fact required to preserve internal order and discipline or to maintain institutional security.

473 F. Supp. at 1187. The court also noted that it was "clear that segregation by cell is no more permissible than segregation on a broader basis, for example by block." *Id.* at 1189, n.4.

Defendant's vague and conclusory predictions of violence, not based on any particular incidents, but rather on their personal, unsupported, beliefs that integrating prisoners will by itself promote racial violence, places their racial segregation policy squarely within the holdings of *Sockwell* and *Stewart* which rejected such purported justifications for segregation. Tellingly, Defendants in their memorandum never once attempt to assert any basis for their use of racial criteria as a means to avoid prison violence. Instead, Defendants rely exclusively on the threat that would arise

from placing rival gang members into the same double cell, a threat that can be avoided based on non-racial screening criteria:

> Disabilities, enemies and gang affiliation and numerous factors are examined. . . . To ensure that they are not placing rival gang members together, there is a rationale connection between not housing inmates of potential gangs rivals [sic], together with maintaining the safety of the institution. Therefore Defendants are acting in a reasonable manner.

Defendants' Memorandum at pp. 15-16. There is no valid, rational connection between Defendants racial segregation policy and the prison system's security interests, and Defendants have completely failed to demonstrate any such connection. Accordingly, Defendants' policy is invalidated by the first *Turner* test "irrespective of whether the other factors tilt in [their] favor." *Shaw v. Murphy*, U.S. Supreme Court, No. 99-1613 (2001 Daily Journal D.A.R. 3755, 3757, April 19, 2001). Summary judgment should be granted to Plaintiff based on Defendants' failure to satisfy the first *Turner* test.

2. Defendants' Policy Permits No Means for Plaintiff to Avoid Living in a Facility Comprised of Racially Segregated Cells.

As indicated above, the Court need not consider the remaining *Turner* factors in light of Defendants' failure to demonstrate a rational connection between segregated cells and an decrease in prison violence. However, even if the court were to rule that Defendants passed the first, and essential, *Turner* test, the remaining three factors strongly favor the Plaintiff.

The first of these factors requires an examination of whether the inmate has available an alternative means to exercise the abridged constitutional right. Here, Plaintiff has an established right to be free from racial segregation. Yet Defendants admit to a policy that has for the last 24 years created an environment where Ms. Schulteis and Mr. Cambra cannot recall a single instance of new inmates being assigned to an integrated double cell. There is plainly only one means to free the California prison system from the shackles of double-cell racial segregation, and that is for Defendants to cease their policy. This first alternative *Turner* factor plainly favors the Plaintiff.

In analyzing this factor, Defendants cite to the fact that after an inmate is initially assigned to a cell with a member of his own race, the inmate may ask to be reassigned to live with someone of a different race. However, the alleged existence of a secondary policy permitting inmates to request an integrated cell does not alter the fact that a practice of segregation is being forced by prison administrators on all incoming inmates. Having institutionalized segregation, Defendants may not require inmates to demand an integrated cell if they want one; to the contrary, those who object to an integrated cell should have the burden of making such a request. In addition, Defendants cite to the fact that inmates who present less of a security risk are able to be housed in supposedly non-violent mixed-race dormitories. This again demonstrates Defendants' failure to link integration in housing with increased violence.

3. A Failure to Automatically Segregate Prisoners by Race Will Not Have a Detrimental Impact on Prison Resources.

On this factor, Defendants' entire argument rests on a premise that initial cell assignments made without regard to race will inevitably lead to increased violence. However, as demonstrated above, and in Plaintiffs' concurrently filed Motion to Strike and Evidentiary Objections, there is no evidentiary basis supporting this faulty premise. Absent this premise, there is no showing whatsoever that avoiding race-based criteria will cause a strain on prison resources. An equal argument can be made that it will ultimately save prison resources. Again, this second *Turner* factor tips in favor of the Plaintiff.

4. Avoiding an Increased Risk of Cell Violence Can be Achieved Without Using Race-Based Criteria.

Defendants profess as a goal the need to avoid violent encounters between bigoted inmates. Defendants admit to a detailed process of screening inmates upon intake into the prison facility. Accordingly, there is no articulated reason why Defendants cannot examine as part of their screening process, in addition to gang affiliation, whether a particular inmate has a psychological profile involving racial animus or a history of inter-racial violence. There is no need to make the unlawful assumption that all members of a particular race will become violent when housed with other races, and any such violent reaction should be dealt with as it would be in any other instance of unlawful prison violence. By altering

the screening criteria in this fashion away from a strictly race-based test, the same goals can be achieved.

"In order to justify segregation practices that infringe on the constitutional rights of inmates, prison officials must show that the practices were necessitated by extreme or exigent circumstances involving racial conflict." *Blevins*, 593 F.Supp. at 247 (citing to *United States v. Wyandotte County*, 480 F.2d 969). A generalized expectation of racial violence is not a sufficient justification for racial segregation. *Blevins*, 593 F.Supp. 245, 247. Application of the *Turner* factors reveals that Defendants have no penological justification for their generalized fear of racial violence. As all of the *Turner* factors tip strongly in favor of the Plaintiff, this Court should hold that Defendants have violated Plaintiffs right to equal protection under the Fourteenth Amendment of the United States Constitution. Defendants' motion for summary judgment should therefore be denied.

IV. BY ACTING TO FURTHER AN AGREED UPON POLICY OF USING RACE-BASED ASSUMPTIONS IN CELL PLACEMENT, DEFENDANTS HAVE DEMONSTRATED A CONSPIRACY UNDER 42 U.S.C. § 1985(3) TO DENY PLAINTIFF HIS CONSTITUTIONAL RIGHTS

Defendants' motion for summary judgment on Plaintiff's conspiracy claim is essentially based on their untenable argument that there has been no "actual deprivation of civil rights" and "no violation of a constitutional right." Defendants' Memorandum at p. 19. As demonstrated above, Defendants' policy of racial segregation is a clear violation of the United States Constitution.

Defendants properly point out that to prevail on a conspiracy claim, Plaintiff needs to establish "racial or class-based animus" by showing "invidiously discriminatory motivation" behind the actions of the Defendants. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Defendants have repeatedly admitted to an agreement among themselves, through their consistently applied policy, to discriminate in cell-assignments and segregate prisoners based on race. From this the court may certainly infer both "racial animus" and "invidiously discriminatory motivation." Indeed, a similar conspiracy claim was upheld in *Santiago v. City of Philadelphia*, 435 F. Supp. 136 (E.D. Pa. 1977). *Santiago* involved claims brought by juvenile residents of a youth detention facility, including a claim of racial segregation resulting from discriminatory placement. The *Santiago* court used a three-part test in holding that the plaintiffs had adequately made out a claim for a conspiracy to deprive them of their civil rights.

First, the *Santiago* court held that a conspiracy to deprive civil rights could be shown "based upon the allegations that the unconstitutional conditions and practices at YSC were due to policies and practices approved or accepted by" the facility executives and implemented by its staff. *Id.* at 155-56. Here, CDC's racial segregation policies and practices were plainly approved and accepted (and admitted in testimony) by Defendants.

Second, to show that the defendants were motivated by race or "'class-based, invidiously discriminatory animus'" the plaintiffs in *Santiago* needed to show discrimination against a well-defined group and that the discrimination:

"(1) affects a traditionally disadvantaged group (e.g. 'suspect classification'); (2) is irrational; or (3) unnecessarily burdens plaintiff's exercise of a 'fundamental' right. *Id.* at 156. As the plaintiffs in *Santiago* were a suspect class and segregated by race in the juvenile facility, this element was satisfied. *Id.* Similarly, here, Plaintiff is part of a suspect-class and has alleged that he has been segregated in violation of his constitutional rights. This is sufficient to meet the race-based, invidiously discriminatory animus, requirement.

Finally, the defendants must have committed overt acts in furtherance of the conspiracy. *Id.* at 155. In *Santiago*, this element was satisfied "by the actions of the staff who allegedly are enforcing practices and procedures approved by YSC management." *Id.* Again, Defendants have repeatedly admitted to overt acts in furtherance of CDC's racial segregation policies.

Under both *Usher* and *Santiago*, Defendants' motion for summary judgment on Plaintiff's conspiracy claim should be denied.

V. A TRIABLE ISSUE OF FACT PRECLUDES SUMMARY JUDGMENT WITH RESPECT TO PLAINTIFF'S EIGHTH AMENDMENT CLAIM

Plaintiff claims that Defendants' racial segregation policy has fostered an environment of racial hostility and increased racial animus that has subjected Plaintiff to an excessive level of violence among inmates which, in turn, has jeopardized Plaintiff s personal safety. Such a claim is cognizable under the Eighth Amendment. *Johnson v. State of California*, 207

F.3d 650, 655-56 (9th Cir. 2000) (and cases cited therein); *see also Leonardo v. Moran*, 611 F.2d 397, 398-99 (1st Cir. 1979) ("[p]rison officials have a duty under the 8th and 14th amendments to protect prisoners from violence at the hands of other prisoners"); *Jensen v. Clarke*, 94 F.3d 1191, 1197 (8th Cir. 1996) (system of inmate assignment to double cells increased the risk of harm to inmates in violation of the Eighth Amendment). In addition, physical injury is not required for a claim of "cruel and unusual" punishment; the infliction of psychological harm that Plaintiff has suffered as a result of the state's practice of racial segregation may constitute the "pain" necessary to permit a finding of an Eighth Amendment violation. *Hudson v. McMillian*, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring).

That racial segregation leading to an increase in violence can permit a finding of "cruel and unusual punishment" is also supported by the case cited by Defendants, *Wilson v. Seiter*, 501 U.S. 294 (1991), wherein the Court states:

> *Some* conditions of confinement may establish an Eighth Amendment violation "in combination" when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need . . . for example, a low cell temperature at night combined with a failure to issue blankets.

Id. at 304. Here, Defendants' knowing allowance of a combination of racial segregation in initial cell assignments coupled with an increased potential for racially motivated

violence may rise to a level whereby Plaintiff is being purposefully deprived of "the minimal civilized measure of life's necessities." *Id.* at 297.

Plaintiff has not moved for summary judgment on his Eighth Amendment claim because triable issues of fact exist with respect to the Defendants' state of mind in permitting violent and racially divisive conditions to persist at the Lancaster facility despite the pendency of Plaintiff's law suit since 1995. *See Anderson v. County of Kern*, 45 F.3d 1310, 1313 (9th Cir.), *cert. denied* 516 U.S. 916 (1995) (defendant needs to act with "deliberate indifference" to a prisoner in causing an Eighth Amendment violation). Defendants' motion for summary judgment on this claim fails to establish that no triable issue of fact exists on this claim. Indeed, an examination of Defendants' separate statement of alleged "uncontroverted facts" reveals not a single suggestion by Defendants that implementation of their racial segregation policy was not intended to create a racial divide at the facility. Moreover, many of Defendants' statements demonstrate that a triable issue of fact exists on this point. *See, e.g.*, Declaration of S. Cambra at p. 4:24-27 (recognizing "problems we have on the yards . . . with respect to racial conflicts including riots, which have lead to serious injury and deaths"); Deposition of Linda Schulteis at p. 27:1 - 28:9 (Ex. C to Declaration of Jeff Hilger in support of Plaintiff's Motion for Summary Judgment) (describing generally the evolution of racial divides in prison facilities). In light of these statements, Defendants cannot prevail on summary judgment.

Plaintiff should be given an opportunity to prove his Eighth Amendment claim at trial. See *Santiago*, 435 F. Supp. at 149 ("[o]nly after a factual hearing, will we be able to determine whether or to what extent the conditions at [the youth detention facility] violate the eighth amendment").

VI. INJUNCTIVE RELIEF HAS REPEATEDLY BEEN GRANTED TO DESEGREGATE PRISON FACILITIES, AND SUCH RELIEF IS APPROPRIATE HERE TO PREVENT A CONTINUED VIOLATION OF PLAINTIFF'S CONSTITUTIONAL RIGHTS

Defendants' assertion that they should not be subjected to injunctive relief is without merit. In *Stewart v. Rhodes*, 473 F. Supp. 1185 (S.D. Ohio 1979), inmates of the Ohio state prison system moved for a preliminary injunction to stop the defendants from assigning new inmates to double cells on the basis of race. As is the case here, the defendant prison administrators admitted to a policy of segregating new inmates by race as a means to "reduce the possibility of racial tension and potential violence which it fears will result from celling black and white inmates together." *Id.* at 1187. The defendants in *Stewart* claimed that such a policy was necessary because they lacked sufficient information about new inmates to risk having racial bias flare into violence. *Id.* at 1187-88. Based on strikingly similar facts and contentions, the court noted that the defendants made no showing whatsoever to support their stated fears about violence:

> Indeed, because integration has not even been attempted at CCF with regard to reception inmates

within at least the past ten years, prison officials could not have had any experience with the effects of integration on which to base their apprehensions.

Upon questioning at the hearing, McKeen admitted that he had not relied on any documented support for the theory that racial segregation reduced tension among inmates. In essence, he acknowledged, the practice is based on his "common sense" attitude toward overall relations between the races.

> In the Court's view, however, an equally "common sense" attitude, and one supported by expert testimony at trial, would indicate that segregation of inmates rather than their integration tends to create racial misunderstandings and tensions.

Id. at 1188 (footnote omitted).[5]

Based on the above findings, the *Stewart* court held that the practice of segregating prisoners by race had not been justified by the defendants, and that the defendants would not be permitted to shield their otherwise unconstitutional actions behind the same "prison security and discipline"

5. The omitted footnote refers to testimony of Dr. David Fogel, a professor of criminal justice at the University of Illinois and consultant on corrections practices, who testified that "segregation did nothing to lessen racial tension or violence, and that integration would do more to lessen these tensions than segregation could."

exception that the CDC Defendants in the case at bar also seek to rely on:

> There is no evidence in this case that the practice at CCF arose out of any extreme or exigent circumstance involving racial conflict. Indeed, it does not appear that there could be any such evidence since blacks and whites have not been integrated in prison reception housing for at least ten years. A vague fear on the part of prison officials that segregation may result in violence is simply not enough to justify suspension of the fundamental constitutional right here at issue.

Id. at 1189.

In deciding that injunctive relief was appropriate, the *Stewart* court examined and the plaintiffs prevailed on the following determinations: (1) whether plaintiff has shown a strong or substantial likelihood, or probability of success on the merits; (2) whether plaintiff has shown irreparable injury; (3) whether the issuance of a preliminary injunction would cause substantial harm to others; (4) whether the public interest would be served by issuing a preliminary injunction. *Id.* at 1193. The *Stewart* court held:

> Upon consideration of the facts of this case it is eminently clear that injunctive relief is warranted under the above criteria. The Court finds that there is a substantial likelihood that plaintiffs will succeed on the merits of their claim, and that plaintiffs have shown clear violations of

> constitutional rights amounting to irreparable harm. Further, having considered and rejected defendants' claims that the challenged measures are necessary for institutional security, the Court cannot find that injunctive relief would cause substantial harm to others. Finally, it cannot be doubted that the cessation of these practices will well serve the public interest. Accordingly, plaintiffs' motion for preliminary injunction will be GRANTED.

Id. at 1194. The *Stewart* court ordered the defendants to cease the practice of segregating cells within ten days from the date of the order, and prohibited any race-based assignments absent a statement in writing from the superintendent stating that the inmate in question should not be housed in an integrated cell, with such finding to be made a part of the inmate's prison record. *Id.* The court made clear that it was not requiring that all cells be integrated, but rather that race not be used as a factor in cell assignment. *Id.* at n.10.

Similarly in *Sockwell*, 20 F.3d 187, the court held that the segregation of double cells at Angola prison was unconstitutional. In 1975, a court order had been issued enjoining racial discrimination at Angola and ordering prison officials to immediately correct any effects of past racial discrimination. *Id.* at 189. This order, which was not complied with until 1990 when the prisoners filed the *Sockwell* lawsuit (*id.* at 190), followed a prior ruling of the Fifth Circuit which had approved the district court's granting of injunctive relief. *Williams v. Edwards*, 547 F.2d 1206, 1212 (5th Cir. 1977) ("[h]aving affirmed the District Judge's finding of

> unconstitutionality of the conditions at Angola we recognize his authority to order relief 'coterminous with the scope of the constitutional violation found to exist.'").

In one of the earliest prison desegregation cases, *Washington v. Lee*, the court imposed a strict duty upon the defendants to "cease the practice of arbitrarily segregating the races in the state, county and city penal facilities." 263 F. Supp. at 332-33. The court issued a decree mandating that defendants "take the necessary and appropriate steps to effect complete desegregation" of the penal facilities. *Id.*

Defendants admit that they have had no experience with integrating double cells for "at least" 24 years. See Hilger Decl. Ex. D, Cambra Depo. at pp. 32:19, 33:5, and Hilger Decl. Ex. C, Schulteis Depo. at p. 22:10-16. In light of these admissions and based on Defendants' admitted constitutional violation, this court has more than a sufficient basis under the above cited cases to find that injunctive relief is appropriate in these circumstances.

VII. BECAUSE THE PROHIBITION AGAINST RACIAL SEGREGATION IS SUCH A CLEARLY ESTABLISHED RIGHT, DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

Law enforcement officers, including prison guards, do not have qualified immunity from civil damage suits if their conduct violates a clearly established statutory or constitutional right of which a reasonable person would have known. *Schwenk v. Hartford*, 204 F.3d 1187, 1195-1196 (9th Cir.2000) (citing to *Harlow v. Fitzgerald*, 457 U.S. 800,

818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Under this standard, summary judgment based upon qualified immunity is improper if, under the undisputed facts, and in light of the established law, a reasonable officer could not have believed his conduct was lawful. *Schwenk*, 204 F.3d at 1196.

Deciding whether an official is entitled to qualified immunity requires a two step analysis: (1) whether the law governing the officials conduct is clearly established; and (2) could a reasonable official have believed the conduct did not violate an identifiable right. *Somers v. Thurman*, 109 F.3d 614, 617 (9th Cir.), *cert. denied* 522 U.S. 852 (1997) (citing *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871-872 (9th Cir.1993)).

Here, Defendants' qualified immunity defense is easily disposed of based on directly applicable precedent. *Sockwell*, 20 F.3d at 192; *Simpson v. Horn*, 25 F. Supp. 2d 563, 574 (E.D. Pa. 1998). In *Sockwell*, the Fifth Circuit held that defendants in that case were not entitled to qualified immunity "due to their knowing and intentional participation in a general policy of racial segregation" with regard to double cells at a correctional facility. *Sockwell*, 20 F.3d at 152. In *Simpson*, the court similarly denied a motion for judgment based on qualified immunity, concluding that "the prohibition on racial segregation in cell assignments is a clearly established right of which a reasonable prison official would be aware." *Simpson*, 25 F. Supp. 2d at 574. The *Simpson* court cited to both *Sockwell* and *Lee v. Washington*, 390 U.S. at 333-34, in finding that the right of a prisoner to be free from racial segregation is clearly established. Tellingly, Defendants offer no cases indicating that the prohibition against racially segregated prison cells is anything other than a clearly established right.

Because protection from racial segregation is a clearly established right, Plaintiff respectfully submits that this court should find that a reasonable prison official ought to know that racial segregation violates a constitutional right, and the court should therefore deny Defendants' motion for summary judgment based on the defense of qualified immunity.

VIII. CONCLUSION

The undisputed evidence establishes that, without adequate justification, the California Department of Corrections segregates inmates by race or ethnicity when they are assigned to housing upon arrival at CDC-controlled institutions, and that the defendant prison administrators have engaged in a conspiracy to act in furtherance of that patently unlawful policy. Plaintiff respectfully request that this court reaffirm the well-established principle that forced racial segregation is unconstitutional, even in prisons, and accordingly deny Defendants' Motion for Summary Judgment in its entirety.

DATED: April 23, 2001

Respectfully submitted,

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APPENDIX N — DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATED APRIL 27, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION

Case No.: CV-95-01192 CBM

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

Date: May 7, 2001
Time: 10:00 a.m.
Courtroom: 2

Honorable Consuelo B. Marshall

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Appendix N

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[Tables of Contents and Authorities Intentionally Omitted]

Defendants submit the following in reply to Plaintiff s opposition to Defendants' motion for summary judgment.

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I.

SUMMARY JUDGMENT SHOULD BE GRANTED FOR DEFENDANTS

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where it is demonstrated that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Avila v. Traveler's Insurance Co.*, 651 F.2d 658, 660 (9th Cir. 1981).

In this case, Plaintiff has opposed Defendants' motion for summary judgment. The Plaintiff opposing summary judgment has the burden of showing that a genuine dispute on a material issue of fact exists. *Post v. City of Ft. Lauderdale*, 7 F.3d 1552, 1557 (11th Cir.1993). "There must be sufficient evidence for a jury to return a verdict in favor of the non-moving party; if the evidence is merely colorable or not significantly probative, summary judgment should be granted." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir.1994). The nonmoving party "may not rest upon the mere allegations or denials of [the] pleading, but must set forth specific facts showing that there is a genuine issue" of material fact as to each issue upon which he or she would bear the ultimate burden of proof at trial. *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 256 (1986); *see also Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 177-78 (2d Cir.1990). Summary judgment in favor of the moving party is therefore appropriate if the opposing party fails: (1) to produce evidence to support the existence of all essential elements on which the opposing party bears the

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burden of proof; and (2) to show that all disputes about material facts or necessary inferences from the facts could reasonably be resolved in favor of either party by the trier of fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Matsushita v. Zenith Radio*, 475 U.S. 574, 585-87 (1986). In this case, Plaintiff has fails to meet his burden and summary judgment should be granted in favor of Defendants Gomez, Rowland, and Cambra and against Plaintiff.

II.

PLAINTIFF HAS NOT DEMONSTRATED STANDING TO BRING THIS CLAIM FOR EITHER DAMAGES OR INJUNCTIVE RELIEF

Before a Federal Court can consider the merits of a legal claim, the person seeking to invoke the court's jurisdiction must establish the requisite standing to sue. To do so, he must prove the existence of an Article III case or controversy by clearly demonstrating that he has suffered an "injury in fact," which is concrete in both a qualitative and temporal sense. He must show that the injury "fairly can be traced to the challenged action," and "is likely to be redressed by a favorable decision." *See Whitmore v. Arkansas*, 495 U.S. 149, 149, 110 S. Ct. 1717, 1722-1723 (1990); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976).

In this case, Plaintiff objects to the initial classification of prisoners conducted when they first arrive at the prison.

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Plaintiff seeks damages against the former Directors of the California Department of Corrections (the "CDC") (Gomez and Rowland) as well as injunctive relief against the current CDC Director (Mr. Cambra.). Plaintiff does not demonstrate standing to sue. Plaintiff entered prison at the California Institution for Men in Chino, California on June 22, 1987. (Exh. 2 to Defendants' MSJ.) Plaintiff's classification summary was completed on July 20, 1987 (28 days later.) (See Exh. 3 to Defs' MSJ.) Plaintiff complains, without evidence, that race was the sole consideration in his initial housing decision. Plaintiff states, that the practice of prison officials, in even considering race in the initial housing decision, amounted to discrimination and violated his constitutional rights. Plaintiff, however, does not make this claim until filing this lawsuit in 1995, some eight years later. Because of his sentence, Plaintiff has no reasonable likelihood of going back through the classification system at the California Institution for Men or any institution again. No other inmate has joined plaintiff in this suit, and this is not brought as a class action lawsuit.

As to his present status, Plaintiff arrived at the California State Prison in Lancaster and has been housed there for some time. Plaintiff has no dispute with the prison's compatibility policy for those inmates who have permanent housing, such as Plaintiff. Moreover, Plaintiff has never asked to cell with an inmate of another race and it has never been denied[1].

1. Defendants believe this is important, in that under current law and, as applicable to the current Director of Corrections, Plaintiff must exhaust his administrative remedies before bringing an action for injunctive relief pursuant to 42 U.S.C. section 1997(e).

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In light of the evidence and the testimony being presented by the Defendants in this case, Plaintiff's demand for personal damages and injunctive relief are confusing in that he is not referring to a policy or practice being applied to him.

"It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). This case further holds that, "it is not the role of courts, but that of political branches, to shape institutions of government in such fashion as to comply with the laws and the constitution." (Id.); *see also Rains v. Byrd*, 521 U.S. 811, 818 (1997) (standing requires a legally and judicially cognizable injury).

The Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient to confer jurisdiction on a federal court. *See Schlesinger v.* Reservists, 418 U.S. 208, 216-217 (1974); *United States v. Richardson*, 418 U.S. 166, 176-177 (1974). Plaintiff has suffered no legally cognizable injury from the prison practice at issue. He lacks standing to maintain this action, and cannot assert third-party rights. Summary judgment should be granted in favor of Defendants and against Plaintiff.

III.

PLAINTIFF HAS NOT BEEN DENIED THE EQUAL PROTECTION OF THE LAW

To establish a violation of the Equal Protection Clause of the Fourteenth Amendment, a Plaintiff must show that a defendant intended to racially discriminate. *See village ofArlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977); *Washington v. Davis*, 426 U.S. 229, 241 (1976). Discriminatory purpose implies more than intent as volition or intent as awareness of consequences." *Personnel Administrator of Massachuesetts v. Feeny*, 442 U.S. 256, 279 (1979). It implies that the decision-maker singled out a particular group for disparate treatment and selected his course of action at least in part for the purpose of causing its adverse effects on an identifiable group. *Shango v. Jurich*, 681 F.2d 1091, 1104 (7th Cir. 1982). Once this showing is made, the Court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439-440 (1985) (holding that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike").

Here, Plaintiff does not demonstrate that any Defendant intended to racially discriminate against him. While Plaintiff doesn't agree with all of the housing practices within the CDC, Plaintiff does not demonstrate that they are for the purpose of singling out a particular group for disparate treatment. Moreover, under the evidence in this case, there

is no indication that the housing practices of the CDC are not equally applied to all inmates. Because of this, the Court need not even reach the second prong of the Equal Protection test, that is: whether or not the policy or practice at issues violates a constitutional right.

Under the second prong, the Supreme Court has adopted a standard for reviewing constitutional rights in the prison context. *See Turner v. Safley*, 482 U.S. 78, 89, 107 (1987). *Turner* focuses on the reasonableness of the prison official's actions. The Court considers four factors to determine whether a prison policy is constitutional: (1) whether there is a valid, rational connection between the policy and the penological interest; (2) whether an alternative means of exercising the right remains open to prison inmates; (3) the impact accommodation of the asserted right will have on guards, other inmates, and the allocation of prison resources; and (4) the absence of ready alternatives that fully accommodate the prisoner's rights at de minimis cost to valid penological interests. *See Id.*, 482 U.S. at 89-90.

In the instant, case, the initial period in a prison is a critical time for prison officials and inmates alike. Upon an inmate's arrival to a reception center, the CDC has only limited information about the inmate. (See MSJ, Exh. 4, ¶ 5.) A classification summary prepared starts to be undertaken to see what security needs can be established. Disabilities, enemies and gang affiliation are all examined during this period. (See Exh. 4, ¶ 6:4-6). Before these are known, there could be great risks to inmates if they were, for example, to be celled with a member of a rival gang. This classification period typically takes sixty days.

(MSJ Exh.4, ¶ 12.) After that, inmates are moved into more permanent housing and can utilize the period of time to find a compatible cellmate. *See id.*, § 15.

This does not amount to discrimination. To prevent rival gangs from being housed together is reasonable. While clearly not all White inmates are members of a White Supremacist or Aryan Brotherhood gang, they could be. Similarly, not all Black inmates are members of the Crips or Bloods, but they may be. Clearly, not all Hispanic inmates are members of the Southern Mexican gang or the Mexican Mafia, but there remains the possibility that they might be. If not identified, the danger is that members of rival gangs would be placed into the same cells and then the potential is that what occurred on the prison yard could occur in the prison cell.

Plaintiff contends that Defendants concerns are based only on speculation about inmates. This is far from the truth. Defendants have produced evidence supporting their opposition to Plaintiffs motion for summary adjudication of issues which raises the same claim. Plaintiff is a Level-IV inmate. In another Level-IV prison, Pelican Bay's general population is currently in a state of lockdown. Lockdowns are where inmates are essentially confined to their cells at all times and all outside-the-cell activities (generally what is known as the "programs") are suspended. This present lockdown stems from a series of racially-based, gang-related conflicts that have erupted into riots and acts of violence on the prison yards leading to serious injury and death. (See Decl.of Associate Warden O'Neill, attached as Exh. 1.) As background of this current lockdown, on June 1, 1998, a riot occurred on the Facility A yard involving 39 Northern

and Southern Hispanic inmates. All Hispanic inmates on Facility A were locked down and, although attempts were made to lift the lockdown, the Southern Hispanic population showed no willingness to program cooperatively and continued to be locked down for over 14 months. (Exh. 1, ¶ 4.)

In August of 1999, a controlled release of Southern Hispanics inmates began which resulted in several small incidents with Northern Hispanics. At that time there were approximately three times as many Southern Hispanic inmates as there were Northern Hispanics. This numerical inequity, as well as the likelihood that this violence would continue, resulted in the decision to place all of the Northern Hispanic inmates into Administrative Segregation pending transfer to other institutions. (*Id.*, ¶ 5.) On March 12, 1999, a riot occurred on the Facility B yard which involved "Fresno Bulldogs" and Southern Hispanics. 90 inmates were involved. This riot resulted in the decision to stop the intake of Fresno Bulldogs at Pelican Bay. (*Id.*, ¶ 6.) On March 15, 1999, three days later, White Supremacist and "Skinheads" attacked non-affiliated [a member of no gang] Whites and Northern Hispanic inmates. 31 inmates were involved in this incident. (*Id.*, ¶ 7.) On March 18, 1999, just three days later, a riot occurred on the Facility A yard. Northern Hispanic inmates attacked White inmates. 39 inmates were involved. The inmates were placed on lockdown until April 14, 1999. (*Id.*, ¶ 8.) On August 31, 1999, a riot occurred on the B yard. Over 100 Black inmates attacked a smaller number of White inmates. (*Id.*, ¶ 9.) On September 9, 1999, a racial disturbance occurred on the Facility A yard involving 7 Black and 4 White inmates. (*Id.*, ¶ 10.) On September 27,1999, a riot occurred

on the Facility A yard involving 30 Black and 3 White inmates. (*Id.*, ¶ 11.)

A plan was developed on Facility A to allow the Black inmates to go to the yard and discuss amongst themselves the need for positive programming. This process was then repeated with the White inmates and, finally, with both groups together. This resulted in full programing for these groups on the Facility A yard. (*Id.*, ¶ 12.) A similar approach was attempted on the Facility B yard. Each group (Black, White, Southern Hispanic) was allowed to go to the yard and discuss their issues. Unfortunately, what followed was a series of yard releases that resulted in violence either perpetrated by the White inmates or the Black inmates. After several inmate instigators from each ethnic group were placed in Administrative Segregation, a series of successful integrated yard releases resulted. (*Id.*, ¶ 13.) On February 23, 2000, however, a riot took place on the Facility B yard involving approximately 250-300 inmates. Southern Hispanic inmates initiated a series of attacks on Black inmates. A large number of Black inmates sustained serious stab wounds and lacerations. Some of the White inmates on the yard joined the Southern Hispanics. It was necessary for staff to utilize both lethal [deadly] and non-lethal force to quell the riot. Sixteen inmates were struck with .223 rounds from Mini-14 rifles, one fatally. Twenty-five inmates were transported to outside hospitals: The institution was placed on lockdown. (*Id.*, ¶ 14.)

On March 24, 2000, Facility A inmates began to be released to the yard in segregated groups. Facility B inmates were not immediately released due to the large number of

riot participants who were still housed on Facility B pending bed space availability in Administrative Segregation. (*Id.*, ¶ 15.) On August 25, 2000 information was received through intelligence that there would be further assaults. On September 1, 2000, and in light of the information, the institution was again locked down. The entire complex was searched and private interviews were conducted with every inmate. The searches revealed the discovery of 78 deadly weapons, 142 items of danger contraband and 6 "hype" kits. At the conclusion of the search, and upon review of the information, it was apparent at this time that no options existed to bring the general population up to safe programming. All previous, reasonable attempts had failed. The findings were of continuing conflict. There was evidence of the stockpiling of weapons and further and serious threat of ethnic racial conflict. This is the background of the current, continuing lockdown of the general population at Pelican Bay. (*Id.*, ¶ 16.) At this time, efforts are underway to lift the lockdown. This will done in a manner where prison officials feel it can be done safely and result in no further violence. This is a slow process. It requires major consideration of the safety of all inmates as well as staff. Every attempt thus far, however, has resulted in racially motivated violence or threats of violence. (*Id.*, ¶ 17.)

By comparison, there has been no evidence produced by Plaintiff that these problems could have been avoided by disregarding race in the initial cell assignments. As Mr. Cambra states, ". . . I feel it would be very irresponsible and I would not allow staff to compromise safety and place inmates in cells without considering these issues as being possible consequences. Because of the

problems we have on the yards, which are open and easily observable areas, with respect to racial conflicts including riots, which have led to serious injury and deaths, I believe that the same problems could and will surface inside of the individual cells. I cannot recommend this compromise of safety." (Exh. 4 to MSJ, ¶ 14.)

Defendants have an additional duty under the Eighth Amendment to protect inmates from a known danger. In *Farmer v. Brennan,* 511 U.S. 825 (1994), the Supreme Court held that under the Eighth Amendment, prison officials have a duty to "provide humane conditions of confinement . . . [to] ensure that inmates receive adequate food, clothing, shelter and medical care, and [to] 'take reasonable measures to guarantee the safety of the inmates . . ." *Id.* at 831. In general, a prison official's deliberate indifference to a substantial risk of harm to an inmate violates the Eighth Amendment. *Id.* at 827. Where the claim at issue is predicated upon the failure to protect, the deprivation is deemed to be sufficiently serious if there was a substantial risk that the prisoner would suffer serious harm. *See Id.* As the declarations of Mr. Cambra, Mr. O'Neill and Ms. Schulteis (MSJ Exh. 3) point out, they make their housing decisions with the paramount concern being safety. In the instant case, in the judgment of prison officials, they do not have adequate information about the inmate until he is classified. To ensure that they are not placing rival gang members together, there is a rational connection to not housing inmates with potential gangs rivals, and therefore Defendants act in a reasonable manner.

In *Simpson v. Horn,* 25 F. Supp. 2d 563 (E.D. Penn. 1998), the Court, addressing a Pennsylvania prison policy held that, ". . . defendants' written policy on classification of inmates for double-celling, which takes race into account as one of several compatibility factors, is permissible, and even possibly required, under the reasonableness standard of *Turner*. . ."*Id.* at 570.

Under the *Turner* analysis, the question for the Court is not whether this does in fact advance the government interest, only whether the Defendants might reasonably have thought that it would, When the inmate does not present enough evidence to refute a common-sense connection between a prison regulation and the [asserted] objective the presumed governmental objective is legitimate and neutral. *See Frost v. Symington,* 197 F.3d 348, 357 (9th Cir.1999). *Frost* further commands (although applied in a First Amendment case, it should be no less applicable in the Fourteenth Amendment case) that if plaintiff does not present sufficient evidence to refute a common-sense connection between the Department regulation and its stated objectives, "prison officials need not prove that the banned material actually caused problems in the past, or that the materials are 'likely' to cause problems in the future." *Id.* at 354. The Court went on to state,

> . . . [I]t "does not matter whether we agree with" the defendants or whether the policy "in fact advances" the jail's legitimate interests. [citation] The only question that we must answer is whether the defendants' judgment was "rational," that is, whether the defendants might reasonably have thought that the policy would advance its interests.

> [citation] This language holds that even in the absence of institution-specific or general social science evidence, as long as it is plausible that prison officials believed the policy would further a legitimate objective, the governmental defendant should prevail on *Turner 's* first prong.

Id. at 355, citing *Mauro v. Arpaio, 188* F.3d 1054, 1060 (9th Cir. 1999).

Although Plaintiff repeatedly refers to the Ohio cases regarding double-celling of inmates without consideration of race (*See, e.g., Stewart v. Rhodes,* 473 F.Supp. 1185 (S.D. Ohio 1979), Plaintiffs fail to address the disturbing and unfortunate aftermath, leading the Ohio Court to reluctantly modify the Consent decree.

> On April 11, 1993, the worst prison riot in Ohio history, and one of the worst in United States history, erupted at the Southern Ohio Correctional Facility ("SOCF"). Nine inmates and one corrections officer were murdered and many others were injured during the eleven day standoff. During negotiations as well as after the riot, prisoners repeatedly cited integrated celling as a factor contributing to the tense atmosphere at SOCF. Among the demands the prisoners made as part of their agreement to end the siege, was that the Consent Decree in this case be reviewed. The siege finally ended on April 21, 1993.

White v. Morris, 832 F.Supp. 1129, 1130 (S.D. Ohio, Western Div., 1993).

In this case, there is no evidence of a violation of Plaintiff's equal protection rights under the Fourteenth Amendment. Summary judgment should be granted in favor of the Defendants on Plaintiff's Fourteenth Amendment claim.

IV.

PLAINTIFF HAS FAILED TO DEMONSTRATE A VIOLATION OF HIS EIGHTH AMENDMENT RIGHTS BY DEFENDANTS

Plaintiff has failed to demonstrate a violation of his Eighth Amendment rights. An institution's obligation under the Eighth Amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care and personal safety. *Hoptowit v. Ray,* 682 F.2d 1237, 1246 (9th Cir.1982). In *Vazquez v. Carver,* 1987 WL 14847 *19 (E.D.Pa.), the court found that the consideration of race in classification of inmates is not cruel and unusual punishment. Summary judgment should be granted in favor of defendants and against Plaintiff on Plaintiff's claims of an Eighth Amendment violation by Defendants.

V.

THERE IS NO EVIDENCE OF A CONSPIRACY TO VIOLATE PLAINTIFF'S CONSTITUTIONAL RIGHTS

Plaintiff alleges that Defendants conspired against him. 42 U.S.C § 1985 prohibits individuals from entering into a conspiracy to deprive an individual of his civil rights. To prevail on a § 1985(3) claim, a plaintiff must prove that the defendants: (1) engaged in a conspiracy; (2) for the purpose of depriving him or her of equal protection, or equal privileges and immunities under the law; (3) acted in furtherance of the conspiracy; (4) deprived the plaintiff of the exercise of any right or privilege of a citizen of the United States; and (5) were motivated by discriminatory animus. *See New York State Nat'l Org. for Women v. Terry,* 886 F.2d 1339, 1358 (2d Cir.1989), *cert.denied,* 495 U.S. 947 (1990). Under the clauses of section 1985, an allegation of racial or class-based animus is an essential element of the claim. *Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir.1987). To establish such animus, a plaintiff must show an "invidiously discriminatory motivation . . . behind the conspirators' action." (*Id.*, at 561) Under *Woodrum v. Woodward County, Okl.*, 866 F.2d 1121 (9th Cir.1989), Plaintiff would have to show both an agreement or meeting of the minds among the defendants to violate his constitutional rights and that the conspiracy actually deprived him of his constitutional rights. *Id.*, at 1126.

Here, Plaintiff states that a conspiracy existed but failed to allege facts that would show that the defendants, motivated

by animus, conspired to deprive him of a substantive right. *See Boddie v. Schnieder,* 105 F.3d 857, 862 (2d Cir.1997).

Summary judgment should be granted in favor of Defendants on Plaintiffs claim of conspiracy.

VI.

DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Prison officials, performing discretionary functions within the limits of their duties, receive a qualified immunity from damages in Civil Rights actions unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. *Procunier v. Navarette,* 434 U.S. 555, 561-562 (1978); *Harlow v. Fitzgerald,* 457 U.S. 800, 818-819 (1982). The purpose of this rule is to permit such officials to undertake their responsibilities without fear that they will be held liable in damages for actions that appear reasonable at the time but are later held to violate statutory or constitutional rights. *Id.* at 819; *Kraus v. County of Pierce,* 793 F.2d 1105, 1108 (9th Cir. 1986). "As the qualified immunity defense has evolved, it provides ample protection for all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341, 106 S. Ct. 1092 (1986). An official is denied qualified immunity only if the law was clearly established and a reasonable official could not have believed that his conduct was lawful. *Somers v. Thurman,* 109 F.3d 614, 617 (9th Cir. 1997).

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Thus, in deciding whether an official is entitled to qualified immunity, the court must inquire: (1) whether the law governing the officials' conduct was clearly established at the time of the alleged violation; and (2) under the law, whether a reasonable official could have believed the conduct did not violate an identifiable right. *See Act Up!/Portland v. Bagley,* 988 F.2d 868, 871-72 (9th Cir.1993). The inquiry focuses on whether a reasonable official in the position of any of the defendants could have believed that his conduct in question was lawful. *See id.* at 872. Additionally, the Ninth Circuit has stated that,

> The question of whether a reasonable [official] could have believed [that his conduct was lawful] is 'an essentially legal question' . . . that should be determined by the district court at the earliest possible point in the litigation. Where the underlying facts are undisputed, a district court must determine the issue on motion for summary judgment.

See id, at 873 (citation omitted).

In this case, there was no violation of a clearly established law. Moreover, Defendants could have reasonably believed that their conduct was lawful under the established legal principles. First, under *Lee v. Washington,* 390 U.S. 333, 334 (1968) prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." Second, Defendants could have reasonably believed that considering race as a factor, among others, when placing inmates into a cell where they are able

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to classify them and ensure there are no rival gang issues at stake is lawful under the established law. It is not the job of the court to determine whether the Defendants' conduct actually violated clearly established statutory or constitutional rights, but rather to decide whether the Defendants could have reasonably believed that their actions were reasonably related to prison security. *See Manhattan Beach Police Officers Ass'n, Inc. v. City of Manhattan Beach, 881* F.2d 816, 818 (9th Cir.1989). Thus, Defendants are entitled to qualified immunity. *See Act Up!/Portland,* 988 F.2d at 871-72.

CONCLUSION

Based on the foregoing, summary judgment should be granted in favor of Defendants Rowland, Gomez and Cambra and against Plaintiff.

DATED: April 27, 2001

Respectfully submitted,

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Attorney General

DAVID DRULINER
Chief Assistant Attorney General

PAUL GIFFORD
Senior Assistant Attorney General

SUSAN DUNCAN LEE
Supervising Deputy Attorney General

s/ Sara Turner
SARA TURNER
Deputy Attorney General

Attorneys for Defendants

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EXHIBIT 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

CASE NO.: CV-95-01192-CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

DECLARATION OF PELICAN BAY STATE PRISON ASSOCIATE WARDEN B. O'NEILL

I, B. O'NEILL, declare as follows:

1. I am employed with the California Department of Corrections (the "CDC") and have been so employed for 21 years. Presently, I am an Associate Warden at Pelican Bay State Prison ("Pelican Bay").

2. One of my duties involves overseeing the "general population" yards at Pelican Bay. The general populations yards include the Facility A and B yards, which house several thousand level-IV inmates.

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3. Pelican Bay's general population is currently in a state of lockdown. Lockdowns are where inmates are essentially confined to their cells at all times and all outside-the-cell activities (generally what is known as the "programs") are suspended. This present lockdown stems from a series of racially-based, gang-related, conflicts that have erupted into riots and acts of violence on the prison yards leading to serious injury and death. At the request of the Office of the Attorney General, and in preparation for this declaration, I reviewed my synopsis of the history of his lockdown that I previously prepared as briefing for the Warden.

4. As background, On June 1, 1998, a riot occurred on the Facility A yard which involved 39 Northern and Southern Hispanic inmates. All Hispanic inmates on Facility A were locked down and, although attempts were made to lift the lockdown, the Southern Hispanic population showed no willingness to program cooperatively and continued to be locked down for over 14 months.

5. In August of 1999, a controlled release of Southern Hispanics inmates began which resulted in several small incidents with Northern Hispanics. At that time there were approximately three times as many Southern Hispanic inmates as there were Northern Hispanics. This numerical inequity as well as the likelihood that this violence would continue resulted in the decision to place all of the Northern Hispanic inmates into Administrative Segregation pending transfer to other institutions.

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6. On March 12, 1999, a riot occurred on the Facility B yard which involved "Fresno Bulldogs" and Southern Hispanics. 90 inmates were involved. This riot resulted in the decision to stop the intake of Fresno Bulldogs at Pelican Bay.

7. On March 15, 1999, three days later, White Supremacist and "Skinheads" attacked non-affiliated [a member of no gang] Whites and Northern Hispanic inmates. 31 inmates were involved in this.

8. On March 18, 1999, just three days later, a riot occurred on the Facility A yard. Northern Hispanic inmates attacked White inmates. 39 inmates were involved in this. The inmates were placed on lockdown until April 14, 1999.

9. On August 31, 1999, a riot occurred on the B yard. Over 100 Black inmates attacked a smaller number of White inmates.

10. On September 9, 1999, a racial disturbance occurred n the Facility A yard involving 7 Black and 4 White inmates.

11. On September 27,1999, a riot occurred on the Facility A yard involving 30 Black and 3 White inmates.

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12. A plan was developed on Facility A to allow the Black inmates to go to the yard and discuss amongst themselves the need for positive programming. This process was then repeated with the White inmates, and finally with both groups together. This resulted in full programing for these groups on the Facility A yard.

13. A similar approach was attempted on the Facility B yard. Each group (Black, White, Southern Hispanic) was allowed to go to the yard and discuss their issues. Unfortunately, what followed was a series of yard releases that resulted in violence either perpetrated by the White inmates or the Black inmates. After several inmate instigators from each ethnic group were placed in Administrative Segregation, a series of successful integrated yard releases resulted.

14. On February 23, 2000, there was a riot on the Facility B yard involving approximately 250-300 inmates. Southern Hispanic inmates initiated a series of attacks on Black inmates. A large number of Black inmates sustained serious stab wounds and lacerations. Some of the White inmates on the yard joined the Southern Hispanics. It was necessary for staff to utilize both lethal [deadly] and non-lethal force to quell the riot. Sixteen inmates were struck with .223 rounds from Mini-14 rifles, one fatally. Twenty-five inmates were transported to outside hospitals. The institution was placed on lockdown.

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15. On March 24, 2000, Facility A inmates began to be released to the yard in segregated groups. Facility B inmates were not immediately released due to the large number or riot participants who were still housed on Facility B pending bed space availability in Administrative Segregation.

16. On August 25, 2000, information was received through intelligence that there would be further assaults. On September 1, 2000, and in light of the information, the institution was again locked down. The entire complex was searched and private interviews were conducted with every inmate. The searches revealed the discovery of 78 deadly weapons, 142 items of danger contraband and 6 "hype" kits. At the conclusion of the search, and upon review of the information, It was apparent at this time that no options existed to bring the general population up to safe programming. All previous, reasonable attempts had failed. The findings were of continuing conflict. There was evidence of stockpiling of weapons and further and serious threat of ethnic racial conflict. This is the background of the current, continuing lockdown of the general population at Pelican Bay.

17. At this time, efforts are underway to lift the lockdown. This will done in a manner where prison officials feel it can be done safely and result in no further violence. This is a slow process. It requires major consideration of the safety of all inmates as well as staff. Every attempt thus far, however, has resulted in racially motivated violence or threats of violence.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of April, 2001, at Crescent City, California.

s/ Barry O'Neill
BARRY O'NEILL, ASSOCIATE WARDEN
PELIGAN BAY STATE PRISON

APPENDIX O — REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES DATED AND FILED APRIL 30, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV 95-1192-CBM (BQR)

GARRISON JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al,

Defendants.

REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES

Hon. Consuelo B. Marshall

Date: May 7, 2001

[Subject to Application to Reinstate]

Time: 10:00 a.m.
Courtroom: 2

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[Filed Concurrently with Plaintiff's Evidentiary Objections to Declarations Submitted in Opposition to Plaintiff's Motion for Summary Adjudication of Issues]

I. INTRODUCTION

In their Opposition, as they did in discovery, Defendants **admit** that they assign prison inmates to double cells based on the race and ethnicity of those prisoners.[1] They also acknowledge, as they must, that "segregation of the races in prisons and jails violates the Equal Protection Clause of the Fourteenth Amendment." Defendants' Opposition to Plaintiff's Motion for Summary Adjudication of Issues ("Opp.") at p. 2, ll. 18-19. They nonetheless seek to avoid entry of summary judgment for Plaintiff on his cause of action for violation of the Fourteenth Amendment by arguing that the segregation they knowingly impose system-wide in California State Prisons "'is reasonably related to [the] legitimate penological interest'[ ]" of reducing violence. Opp. at p. 2, ll. 27-28, quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987). However, they ignore the specific directive of the

1. In his declaration submitted in support of the opposition, Acting Director of Corrections Steven Cambra says: ". . . race is considered during the initial double-cell housing classification decision." (Declaration of S. Cambra in Support of Defendants' Motion for Summary Judgment ["Cambra Dec."], attached to the Opposition as Exhibit 2, at ¶ 8, p. 3.) The Associate Warden of the California State Prison at Lancaster, where plaintiff resides, expressly states: "If the inmate will be housed in a double-cell, the initial housing is done by generally housing an inmate with another inmate of the same ethnic race." (Declaration of L. Schulteis in Support of Defendants' Motion for Summary Judgment ["Schulteis Dec."], attached to the Opposition as Exhibit 3, at ¶ 5, p. 2.)

Supreme Court in *Lee v. Washington*, 390 U.S. 333, 334 1968), which, ironically, they cite[2] but fail to address, that prison authorities may take account of race when dealing with potential violence only **in particularized circumstances**, contending, instead, that they must **always** assume that all members of different races and ethnic groups will do each other violence if housed together.

In large part Defendants simply repeat the insufficient presentation they made in support of their own motion for summary judgment. (So as not to burden the Court with additional paper, Plaintiff therefore incorporates herein by reference his opposition to that motion.)[3] Perhaps recognizing the total absence of a showing sufficient to overcome the Supreme Court's holding in *Lee* that "a generalized or vague fear of racial violence is not a sufficient justification for a broad policy of racial segregation" (*Sockwell v. Phelps*, 20 F.2d 187, 191 (1994); *see, also, United States v. Wyandotte Co., Texas*, 480 F.2d 969, 971 (10th Cir. 1993)), Defendants submit and discuss at great length a declaration by the Associate Warden at Pelican Bay State Prison concerning "racially-based, gang-related, conflicts that have erupted into riots and acts of violence **on the prison yards**" at Pelican Bay State Prison. Declaration of Pelican Bay State Prison

2. *See, e.g.*, Opp. at p., 2, ll. 19-22 and p. 12, ll. 10-11.

3. That opposition consists of: Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment; Motion to Strike Based on Evidentiary Objections; and Response to Statement of Uncontroverted Fact and Statement of Genuine Issues, collectively referred to below as "Opp. to CDC Motion."

Associate Warden B. O'Neill at ¶ 3, p. 2; emphasis added. That declaration provides a great deal of information about Pelican Bay, including the presence of many weapons among the inmates. However, *nothing* in that declaration has anything to do with system-wide cell housing decisions based on race, the only issue in this case.[4] Perhaps the greatest significance of the Pelican Bay declaration is its silence on that issue. That silence underscores Defendants' utter failure to proffer evidence of **particularized circumstance** to support their imposition of a system-wide practice of assigning prisoners to cells that are segregated on the basis of race and ethnicity. Plaintiff therefore is entitled to entry of judgment on his second and third claims for relief.

II. ARGUMENT

In their Opposition, Defendants assert that Plaintiff has failed to establish that they have violated his Constitutional Rights. Significantly, however, they have failed to dispute a single fact that Plaintiff presented to this Court in his Statement of Uncontroverted Facts -- all of which should now be accepted by the Court pursuant to Local Rule 7.14.3 -- and they ignore the Ninth Circuit's opinion in this very case. That opinion, reported at 207 F.3d 650 -- a copy of which also is attached to the moving papers as Exhibit A -- implicitly rejects the suggestion in Defendants' Opposition that Plaintiff lacks standing to assert the Constitutional

4. Plaintiff has objected to the entire declaration on grounds of relevance. Discussion of the declaration is without prejudice to that and other asserted evidentiary objections.

challenges set forth in his complaint[5] and explicitly holds that if established -- and, as demonstrated in Plaintiff's moving papers, they have been -- those allegations make out claims for violation of the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1985(3). 207 F.3d at 655.

Defendants' effort to justify their system-wide practice of segregating inmates in two-person cells based on race and ethnicity by invoking the Supreme Court's decision in *Turner v. Safley*, 482 U.S. 78, is unavailing -- as Plaintiff demonstrated in his Opp. to CDC Motion at 9-11. In fact, as noted by the District Court in *Simpson v. Horn*, 25 F. Supp. 563, 572 (E.D. Pa. 1998), virtually every one of the rationales invoked by Defendants here was cited by the defendants in *Sockwell* -- and rejected because it failed to meet the particularized need test of *Lee*.

Nor does the O'Neill Dec. change the equation. Warden O'Neill's duties include overseeing the "general population" yards at Pelican Bay. (O'Neill Dec. ¶ 2, p. 1.) Nothing in his declaration covers his role, if any, in making cell housing decisions. His five-page declaration indicates that there have been numerous racial riots at Pelican Bay prison. The declaration also discusses some of the reasons that Warden O'Neill believes the riots occurred and focuses on the presence of weapons and other contraband among the inmates at that facility. None of this has anything to do with inmates of one race being housed with inmates of a different race -- the issue in this case.

5. For a full discussion of Plaintiff s standing see Plaintiff's Opp. to CDC Motion at pp. 3-5.

Plaintiff agrees with Defendants that racial riots do occur at CDC facilities. However, while Defendants contend that inmates are fundamentally and perhaps innately full of racial animus, Plaintiff Johnson believes that the system of racial segregation itself, instituted and enforced by the CDC, is a fundamental cause of the racial tensions leading to the sort of racial riots illustrated by the O'Neill Dec.

But for the purposes of *this* motion, Warden O'Neill's reports of riots at Pelican Bay and why he thinks they occurred are totally irrelevant[6] except and only to the extent that his declaration underscores the degree to which Defendants are impermissibly using generalized fears of violence based on their experience at one facility to attempt to justify a policy and practice of cell segregation **throughout the entire California prison system.**

Plaintiff already has addressed each of Defendants' other arguments in his opposition to their summary judgment motion. He therefore respectfully directs the Court's attention to those portions of the Opp. to CDC Motion that demonstrate that (1) by acting to further an agreed upon policy of using race-based assumptions in cell placement, Defendants have demonstrated a conspiracy under 42 U.S.C. § 1985(3) to deny Plaintiff his Constitutional Rights (Opp. to CDC Motion at pp. 13-14); (2) injunctive relief has repeatedly been granted to desegregate prison facilities, and such relief is appropriate here (*id.* at pp. 16-19); and (3) because the prohibition against racial segregation is such a clearly established right, defendants are not entitled to qualified immunity (*id.* at 19-20).

6. In this regard, Plaintiff respectfully reminds the Court that he is not even a resident of Pelican Bay. Rather, he is an inmate at the Lancaster State Prison.

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III. CONCLUSION

Plaintiff's Motion for Summary Adjudication of Issues asks this Court to determine two things: (1) that CDC's race-based system-wide housing placement practice is violative of his rights under the Fourteenth Amendment, and (2) that the practice, as implemented by all CDC directors, wardens and employees is evidence of a conspiracy to violate his Constitutional rights. For the reasons set forth in the moving papers and above, Plaintiff is entitled to judgment on these issues.

Because there are issues of fact regarding the extent of the physical, mental, and emotional damage suffered by Plaintiff, those issues cannot be addressed by the Court at this time. Rather, they should be examined at a trial on damages and on Plaintiff's remaining claim for relief following this Court's entry of an order holding that the CDC is liable on the second and third causes of action.

DATED: April 30, 2001

Respectfully submitted,

PROSKAUER ROSE LLP
BERT H. DEIXLER

and

JEFF GARCIA HILGER

By: s/ Lois D. Thompson
LOIS D. THOMPSON
Attorneys for Plaintiff
GARRISON JOHNSON

APPENDIX P — HEARING TRANSCRIPT OF PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATED JUNE 11, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES, CALIFORNIA

Case No. CV-95-1192-CBM
(BQRx)

Los Angeles, California
June 11, 2001
10:50 a.m.

GARRISON S. JOHNSON

Plaintiff

vs.

STATE OF CALIFORNIA

Defendant

PLAINTIFF'S MOTION FOR SUMMARY ADJUDICATION OF ISSUES AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THE HONORABLE HARRY L. HUPP, PRESIDING
UNITED STATES DISTRICT COURT JUDGE

Appendix P

APPEARANCES:

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ALSO PRESENT: KATHERINE CHANG,
Harvard Law Student

PROCEEDINGS BEGIN AT 10:50 A.M.

(Court is Called to order)

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THE CLERK: Item Number 2, CV-95-1192 CBM, Garrison S. Johnson versus State of California, counsel please state your appearances.

MR. DEIXLER: Good morning, Your Honor. Bert Deixler and Jeff Hilger on behalf of Mr. Johnson. And with the Court's permission --

THE COURT: What was that second name?

MR. DEIXLER: Mr. Hilger. H-I-L-G-E-R, the Mr. Hilger is going to make his maiden argument in a federal court this morning. With the Court's permission we have a summer associate from our firm Katherine Chang of the Harvard Law School and I would request her permission to sit at counsel table as well.

THE COURT: Of course.

MR. DEIXLER: Very well, Your Honor.

THE COURT: And Ms. Turner.

MS. TURNER: Good morning, Your Honor. Sarah Turner, Deputy Attorney General on behalf of the defendants.

THE COURT: Well you've got an interesting case, I read the 9th Circuit opinion which reversed Judge Wardlaw on the motion to dismiss. And they said get somebody who knows what they're doing to work on it for the plaintiff and they [4] did. And the Court appreciates the work that plaintiff's counsel has done in straightening out what must have been a

fairly confusing mess to start with. And it is presented in rather clear fashion.

As you can see I didn't think there was anything to the 8th Amendment claim. There's the type of injury which is claimed is really not the type of injury that the 8th Amendment thinks about. So we're really talking about equal protection. And as a matter of fact the principal cases involved use the equal protection clause, the *Lee* case and the *Turner* case and most of the others, the one in the 5th Circuit and the one I think it was the 8th Circuit, the other circuit that you cited.

They talk about equal protection and as you can see I ended up thinking that there is an issue of fact on equal protection. I didn't see anything to tot he conspiracy. The Department of Corrections has followed the same policy through three administrations. But it didn't seem to me that that was an indication that the three directors of the department were conspiring with each other. They were maintaining the same policy obviously, which I didn't think was conspiracy, so.

My tentative got rid of the conspiracy claim and the equal protection claim, but found a triable issue of fact under the equal protection claim. And let me, Mr. Hilger, me let you start on that and then I'll call on Ms. Turner to [5] talk about whether there is anything left of equal protection here.

MR. HILGER: Okay, Your Honor, I'd like to briefly address the conspiracy and 8th Amendment points and then also get into a little bit of the equal protection because I do

believe that there is no triable issue of fact on that question. But I'll save that for the end.

THE COURT: Yes.

MR. HILGER: Regarding the conspiracy there is -- we're not claiming conspiracy among the three different directors. We're claiming a conspiracy within the Department of Corrections. And there's one crucial piece of evidence that is presented in the record and that is that there is clearly an agreement from the top to the bottom to enforce this policy of segregation. And that, it's been articulated at the top by CDC director, Steven Cambra who says, yes we have this policy. And everybody down the line follows this policy.

If we accept for the sake --

THE COURT: Is that a conspiracy?

MR. HILGER: We believe so, cause if we accept for the sake of argument that this policy is illegal and they're agreeing to do something that is --

THE COURT: Anytime you have a government policy every government employee who follows a policy is a conspirator?

[6] MR. HILGER: If the policy is clearly, as we believe this policy is, illegal. They are agreeing to look at a person and because of the color of their skin house them in a certain place. That policy has been fifty years ago, *Brown versus Board of Education* has been eliminated from our government.

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THE COURT: Slow down now. You're statutory vehicle was Section 1983 and under all of these claims of course. There's no such thing as responding at superior responsibility under 1983. You could sue the individual who does the unconstitutional act under Section 1983, you can't sue the policeman unless he uses excessive force on somebody, you can't sue the sargent and the lieutenant and the captain under responding superior. It's just no claim.

Now you're individual defendants who are the respective directors, two former directors and the present director of the Department of Corrections and your facts appear to be that the same policy was used by the Department of Corrections though all three administrations. To my mind that doesn't amount to a conspiracy even though you may have under leads exercising the policy, you're going to have to sue the particular under lead if you want to bother, which isn't worth your while frankly. But, and not sue the director for conspiring to have this policy. It's just not a conspiracy.

You know a civil conspiracy is merely a way of [7] broadening the scope of people who are liable. And you find it -- you find under 1983 these conspiracy cases are people who joined in the direct commission of an unconstitutional act. The three officers out on the beat who join in whaling away with the baton on the victim by pre-agreement between them that they are going to whale away with the baton on the victim just doesn't fit here.

MR. HILGER: Well, although this case is less visible dramatic we believe that the violation is just as clear. I mean not only has every court from every other district that's looked

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at this question come out the same way, it is a clearly volatile policy and if those --

THE COURT: Wait a minute, what's the point in having a conspiracy claim if the three directors are not conspiring with each other?

MR. HILGER: By -- we believe that the fact that they are conspiring down to their subordinates, if I'm that person at the bottom and I know that that policy is wrong, we believe that that subordinate has a duty to inform their superiors that this is wrong and by conspiring, by agreeing to enforce a policy that we think is clearly to any reasonable observer wrong that there is that element of conspiracy.

THE COURT: What's the point in having a conspiracy allegation if you're not going to join other people in it?

MR. HILGER: We feel that it was a violation so [8] that's the reason for the inclusion, we feel that --

THE COURT: Okay, let's talk about the 8th Amendment.

MR. HILGER: Yes, Your Honor.

THE COURT: Cruel and unusual punishment is usually used in situations where somebody is left to suffer physically --

MR. HILGER: Right.

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THE COURT: -- in prison there's a line of cases that failed to provide medical attention for example, where reasonably unnecessary, can be cruel and unusual punishment. I suppose if somebody thought to install, hang the prisoners from, like they did in the mediaeval times in the dungeon from their wrists with their feet shackled to shackles, would be cruel and unusual punishment.

That seems to me to the be the type of meaning that is implied by the people who wrote the 8th Amendment. Rather than the type that your attributing to in this claim.

MR. HILGER: In this case we were clearly requesting the Court to give an opportunity for us to show that there is a triable issue of fact. We believe and Mr. Johnson claims he has suffered the kind of emotional, psychological damage that past Courts have found segregation caused among school children --

THE COURT: Yes, what --

MR. HILGER: -- this is that sort of psychological damage.

THE COURT: Yes, but where's the evidence of that? This is a motion for summary judgment.

MR. HILGER: Again, this is the kind of thing that we knew was a triable issue of fact, we didn't focus on, we didn't make an affirmative motion for summary judgment on this claim.

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THE COURT: I understand.

MR. HILGER: We believe that we can --

THE COURT: Yes, we're talking about the defendant's motion for summary judgment on the 8th Amendrnent here.

MR. HILGER: In --

THE COURT: I understand that you only move for summary judgment on the equal protection and conspiracy claims.

MR. HILGER: We believe that just based on Mr. Johnson's claims and based on his deposition testimony that he has suffered psychological damage, he testified to that at deposition. We believe it's a triable issue of fact. If this case is going to go to trial, we believe it should be part of the evidence at trial.

THE COURT: Say, in his deposition didn't he say he's as happy as a clam with his roommates?

MR. HILGER: With his -- some roommates at some [10] times, but not consistently happy. If he was consistently happy with his cell mates he would have never filed this claim. Also, Your Honor, he did state at deposition he didn't think it was possible for him to have anyone other than a black cell mate. I've talked with Mr. Johnson, he's expressed to me his belief, which I share, that by being put into a random system with others of different races that he would expand his mind, he would expand diversity, he would benefit from that and his inability to be able to do that has caused him harm.

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THE COURT: Is that cruel and unusual as opposed to a violation of his right to equal protection?

MR. HILGER: We believe that in addition to being in violation of his equal protection that it is cruel and unusual because he has no opportunity to grow in that way and he has no chance, Your Honor, of learning that sort of thing. And that he is suffering psychologically and emotionally because of that and would simply request the opportunity to prove that at the trial.

THE COURT: Okay. Now, let's talk about equal protection. My tentative has a denial both of your summary judgment motion and of the defendant's summary judgment motion on equal protection. That seems to me really -- that claim is at the heart of the case. What we're talking about is how -- whether the facts are so clear one way or the other the[11] summary judgment should be granted under the standards basically the *Lee* followed by the *Turner* case.

Lee says segregation of housing in prisons is unconstitutional and then it's got a qualifying sentence, prison authority is acting in good faith and in particularized circumstances may taken into account racial tensions in maintaining security, discipline and good order in prisons and jails. That was the qualification.

Turner came along and put more modern terminology in it, it said strict scrutiny doesn't apply. You look at it with a differential eye and you have four tests. And the four tests are stated in rather general terms, I've got to say. You're looking at a rational relationship between what the person is

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doing and what they call a governmental interest at stake. I assume they mean the security and safety of penalogical (sic) institutions in that. They're looking at whether there are alternatives and least restrictive alternatives and they're looking at something called the impact of recognizing the right on prison resources and guards. Or in other words, would your costs skyrocket if you had to do something else or make a danger for the guards.

And here's what the defendants have outlined. They say first at the initial receipt of the defendant at the inmate reception center down at Chino, there's another one in Northern California, and also when he's first received at a [12] new institution they do use race as a factor in double celling. They say we also use other factors, what we know about gang membership, what and whether both parties smoke or don't smoke, whether they're of comparable age and so on. But they come right out and say because of the prison gang factor, which are in effect self organized into racial groupings by and large, we have to initially for safety sake put the prisoner in with somebody of his own race.

Now I assume that doesn't they mean if they know that one is a Blood and one is a Crip they put them in the same cell. But otherwise they do it by race. And then they say after the initial analyzation factor and the -- while they do not describe in great detail in the declarations the various things they do down in the inmate reception center in Chino, they do quite an extensive review of testing of trying to -- of interviewing, of trying to get the history of the inmate and so on. And then they decide which institution the inmate goes to. Actually it could be Chino, they've got a prison section at Chino also.

More often it's another one of the prisons in the state, where again they do a compatibility study. If the prisoner, as I understand the facts which don't seem to be disputed, if the prisoner is of a security classification where he can go into a dormitory setting it's a desegregated dormitory setting. Where the prisoner is of a higher, [13] apparently of a higher risk and I gather Mr. Johnson fell in that category that putting him in double cells.

Now here's where you've got an issue of fact, Mr. Johnson says that so far as his observations have been and he's been in a whole broad selection of California prisons, he's never seen a double celling with an integrated setting. And he said he's never been offered such a thing. He also says, I've never asked. But whether that's here nor there that's part of the factual picture. The prison people say that a prisoner is entitled within limits to select his own cell mate and that they honor that selection wherever they can, which leads to the impression they're saying we routinely honor these things unless there's some special reason not to, at least that was the conclusion I drew.

MR. HILGER: May I address that briefly?

THE COURT: Yes, hang on just a minute, you're going to address the whole schmeir.

MR. HILGER: Okay.

THE COURT: I'm trying to state what I understand to be the facts that aren't disputed. There is a disputed fact situation as to whether integration is a realistic thing once

this original classification study at each institution and also at the inmate reception center, actually work to have an integrated prison system and that's I think, part of the issue of fact here that you're going to end up trying. The prison [14] people do not say that they have any what we would now call, which I guess at some places is now a dirty word, an affirmative action program to create a desegregation in double cell situation.

They do say it is open to the prison. Mr. Johnson says, nobody ever told me that and in fact in the entire time I've been in prison which is, well fifteen years, I've always had a black cell mate. It seems to me that first, if your standard is not strict scrutiny but, what's the phrase?

MR. HILGER: Valid rational connection.

THE COURT: Well, okay --

MR. HILGER: That was from *Turner.*

THE COURT: But a differential approach to the very serious problems that prison administrators have regarding the safety of prisoners and which you don't need an affidavit to tell you about them, you can read about them in the paper. Not only in the county jail, but in various state prisons. The prison authorities do have serious problems because of the frequent occurrence of gangs where the prisoners self select into racial groups, that they have to deal with this problem, you've got a question the fact of whether the way they're going about it with a differential treatment that the *Turner* case says that you look at, is within the meaning of

the equal protection clause. And that's where I found your issue of fact here.

[15] That's a long winded statement, I guess what I have in the tentative ruling which, from which I tried to determine how this case should go. Let me get your views on this.

MR. HILGER: Okay I'd like to first address -- I basically am hearing two questions of fact that Your Honor finds. The first is the question of whether or not he really does have a choice to move.

THE COURT: Yes.

MR. HILGER: To that I would -- and the second is whether doing something about this integration is really a possibility.

THE COURT: Yes. Well, there is a question with regard to the initial housing situation --

MR. HILGER: Right.

THE COURT: -- at the inmate reception center while their doing their testing and classification. And at each institution when the new prisoner arrives at that new institution they do admit that they tend to classify prisoners by race when on double summing, for this initial purpose of evaluation. Thereafter they say, it's open to the prisoners themselves whether they want to be integrated. Well, you've got a question as to whether that (A) under the *Lee* case that's good enough and (B) whether it's actually realistic in the real world --

[16] MR. HILGER: Right what we would contend is that it is not --

THE COURT: -- which is really where Mr. Johnson's testimony comes into effect --

MR. HILGER: Yes.

THE COURT: -- because he says nobody ever told me this and while my roommate, at least the cell mate now is compatible, I never knew that I had a choice, open choice of cell mates.

MR. HILGER: Right. What we would state is that that open choice doesn't happen, as Your Honor knows, until sixty days into the process. So the --

THE COURT: Well at inmate reception center that's a case. I don't think there are facts that show whether it was sixty days at the individual institutions like Folsom and --

MR. HILGER: The one --

THE COURT: -- Calipatria and so on --

MR. HILGER: The one fact that we do have, that we know, is that when a prisoner transfers as Mr. Johnson was transferred within the past two weeks to yet another institution --

THE COURT: Oh really?

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MR. HILGER: Yes.

THE COURT: Where is he now?

MR. HILGER: Lompoc, I believe.

[17] THE COURT: Oh my.

MS. TURNER: Lompoc --

THE COURT: It won't be Lompoc, that's a federal prison.

MS. TURNER: Tehachapi, I believe.

MR. HILGER: That doesn't sound right.

MS. TURNER: Corcoran

MR. HILGER: Corcoran.

THE COURT: Okay Corcoran.

MR. HILGER: When a prisoner is transferred there's one document that was testified to, the form CDC135 that accompanies him or her. That document lists three pieces of information with an optional extra line. The three required pieces of information are name or number, it's the same thing, custody level and ethnicity.

THE COURT: Yes.

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MR. HILGER: There's a blank space where gang affiliation can be included so if we know this prisoner is a gang member, then we know coming into the next facility that he should not be placed if he's a Crip, he should not be placed with any other Crips. What happened -- that happens with prisoners who are gang members.

THE COURT: Yes.

MR. HILGER: If he's not a gang member we're still looking at his race and that's what we contend is the [18] violation.

THE COURT: Yes, I understand.

MR. HILGER: And the only area where we believe that there are undisputed facts is with this initial placement policy. When he first arrives, ethnicity is looked at, the department agrees, the state agrees, there is not enough time to look at anything other than race. Which leads me into this sort of standard of scrutiny that I would like to address briefly also.

THE COURT: You know part of the most sever rivalry between gangs, at least in the past, maybe its died down now, used to be between two black gangs, Crips and Bloods --

MR. HILGER: So how does separating blacks --

THE COURT: I don't know how the prison tells the difference there --

MR. HILGER: Well --

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THE COURT: -- reading the declaration of Warden O'Neil from Pelican Bay, apparently there are also severe rivalries between types of Hispanic gangs, which is something new on me, I've never heard that one before, but apparently has caused some bloodshed up at Pelican Bay. And so --

MR. HILGER: Clearly, Your Honor --

THE COURT: -- this complicates the prison authorities problems I suppose --

MR. HILGER: I agree it's a huge part of their job [19] and obviously Your Honor, none of us here are experts in prison administration, but we are supposed to be at least, strive to be experts in reason. Let me just present this one thought.

THE COURT: Okay.

MR. HILGER: I believe that if a Crip -- if the goal is to keep separate members of gangs separated and we know that most rival gangs are of the same race, the Crips and the Bloods are black gangs.

THE COURT: Yes.

MR. HILGER: How does putting two blacks into the same cell, in any way help eliminate gang problems?

THE COURT: You know I was going to ask Ms. Turner this same question. I assume that if you have a known Crip and a know Blood you don't put them in the same cell.

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MR. HILGER: We believe and Mr. Johnson believes --

THE COURT: If they have a blue --

MR. HILGER: Sorry.

THE COURT: -- blue bandana and a red bandana you don't mix em up, is that the test --

MR. HILGER: And yet well they --

THE COURT: -- is that the sign?

MR. HILGER: -- they do make attempts to --

THE COURT: Whatever, hang on Ms. Turner, I'll give you plenty of chance on that one.

[20] MR. HILGER: What we believe is that the CDC is using race as a scapegoat to somehow connect it together with gangs. We agree that members of rival gangs should not be housed together. We agree that gang affiliation, gender, custody level are all completely valid. What we have a problem with is race. And on the summary judgment issue we would contend that the state has not offered one shred of evidence to show how integration of cells leads to violence. In fact the state has offered evidence that in the dormitory bunks although they do segregate the bunks, black bunks and white bunks, all of the different races are in the same building and there are no problems with violence that have been put into the record.

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In the job situations they have integrated, no situations of violence.

THE COURT: Yes.

MR. HILGER: There have been no studies, there has been no evidence presented through discovery at any point, that shows that there is any rational connection which is the loosest standard applied by *Turner*, to race and integrated cells. And that is why we would request the Court to reconsider granting summary judgment in Mr. Johnson's favor but leaving open the issue of damages, because we agree with Your Honor that the question of what to do about this is huge and should be dealt with at trial. We're not -- we're just [21] claiming liability, that the state has a policy which is illegal and that there is no connection between their policy, only talking about race, I don't think they should -- race and gangs go together, they're separate. So --

THE COURT: Well no no, there is some correlation. That doesn't mean that every black person is a gang member or every white prisoner is a member of the Arian brotherhood or every Latino is a member of the Mexican Mafia. But those groups do tend to self organize by race --

MR. HILGER: We -- I agree.

THE COURT: -- and this is something a practical problem that the prison authorities have to agree -- have to deal with. Now, really your question comes down to this. And first let's look at the part where the prison authorities in effect is meant segregating by race and that's the first sixty

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days at the inmate reception center and thereafter for some undetermined period at each new institution where the prison comes while they evaluate that prisoner.

There is, it seems to me a question of whether that is a sufficiently rational connection if it's limited to a temporary period to survive your *Lee* rule, based on one of those *Turner* tests of a rational connection to a legitimate penalogical objective, that is to keep the gangs apart.

And the argument I understand the state to be making, is that it takes us a little time to figure that out. [22] Now, I don't know whether that argument is going to hold water or not when it comes down to trial time. It may not. There is a similar case out of the 5th Circuit what is it *Slockcom* (sic).

MR. HILGER: *Sockwell v. Phelps.*

THE COURT: Yes. Where same thing apparently, well that was apparently on permanent living considerations not temporary. But the 5th Circuit came down pretty hard --

MR. HILGER: Yes.

THE COURT: -- on that. And now here in California you apparently have a situation where the prison authority is saying, we need time to evaluate the danger before we get into the integrated system. Then there's a second question of once they get past the situation, whether they actually do get into an integrated situation. And they say we give the opportunity, query whether that's enough. It seems to me that that's a question of trier of facts is going to have to evaluate.

MR. HILGER: I would again -- I would agree on the second point, I think that's a question of damages. On the first point I would ask Your Honor to consider the thought that the argument that they need time is really sort of smoke and mirrors. Because if they need time to make sure that people aren't from rival gangs then logically it would make sense for them to put a white with a black and a Asian, a [23] Japanese with a Chinese, they're concerned about Japanese and Chinese killing each other.

It would make sense for them to put people who they knew wouldn't be of rival gangs. You can be pretty sure that an Asian and I don't know what all the intricacies are, an Asian and a black probably aren't going to be from rival gangs. And it might even make more sense for them to put opposite races together in that waiting period. The fact that they don't do that leads me to believe that it really is just a scapegoat for their desire to rest on their generalized fears of racial violence. What Director Cambra told me in deposition wasn't that it -- this was a temporary solution, what he said was if I put a black and a white in a cell together I'm setting them up to kill each other. And I'm paraphrasing but that was -- and I can find direct language, that was the crux of what he was saying.

Again, what Warden Solte said, if you put a Japanese and a Chinese togther they will kill each other. There's no question about it. That kind of thinking is what needs to be undone. And I believe that it's not -- because the law is so clear I don't think the question of whether it's temporary or permanent really is -- I think that is a legal issue. And I think that's left for the Court to decide today rather than at trial, I

don't think that's really a question for a factual question. Whether that is [24] constitutional to allow that temporary time period because that's what is being plead now here in front of this Court.

So I would just leave --

THE COURT: As I looked at the file I didn't see much on how a prison authority -- prison authorities can tell either at the inmate reception center down in Chino or at one of the prisons, what immediately tell, what gangs a prisoner belongs to. There just, didn't seem to be a posse of evidence on this. I suppose you can ask the prisoner and maybe he'll tell you the answer and maybe he won't.

MR. HILGER: There's a blank space on that form 135 which is other information and I suppose that would be where that goes although --

THE COURT: Well that's where they may write it down once they learn. How do they learn?

MR. HILGER: Well they have that -- this is probably more of a questions, but I believe they have background information. By the time they get to prison there's already a file, there's a police file, there's all this other kinds of stuff that travels with them --

THE COURT: Well yes --

MR. HILGER: -- and they sometimes know and sometimes don't. But them sometimes already know.

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THE COURT: If it's like the federal system, the probation report --

[25] MR. HILGER: Right.

THE COURT: -- which has a good deal of information that goes with the prisoner to the prison authority.

MR. HILGER: So if the systems working they should already know by the time they get there.

THE COURT: I assume -- well maybe yes, maybe no. I assume that that's done in the state system too. Although I spent twelve years on the superior court, I don't remember what goes with a prisoner to Chino, to inmate reception. I do know at Chino they have a very intensive study period with regard to each prisoner. They go through a battery of tests, they go through several interviews and what they're doing is trying to classify the prisoner by danger and also ability to do work so that -- and what kind of setting they want to set him in. They want to know his drug background, whether they have to send him to a facility that has a drug treatment facility and a whole range of other things.

And at the end of that period and they say it takes about sixty days, that's when they designate the institution the man goes to.

Frankly, I don't know how much of that information. goes with the prisoner to the institution --

MR. HILGER: Well --

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THE COURT: -- because apparently when the guy arrives at the particular institution and Mr. Johnson I gather [26] went to Folsom first, that's one of the heavier institutions in the state system, at least it used to be. As I read the testimony of these directors and the system wardens, there are a couple of them, they again go through an evaluation process at the prison. They don't tell me how long that takes or why it's necessary in addition to the information they get at the inmate reception center.

I don't think that those facts are in this record and maybe the subject of inquiry at the time of trial. Okay --

MR. HILGER: Again, I would respectfully argue that that would be an issue of damages as a final result if the state is held liable. And lastly, before I sit down I would just like to put this in front of the Court in case the Court didn't get it from the record, what Mr. Johnson is requesting, and my opponent has no authority to do this but the Court does, is requesting in the interim a transfer to federal prison where he believes that this race based cell housing is not an issue. So, I would just like to leave that with the Court here today.

THE COURT: If he isn't convicted of a federal crime there is no way he's going to be in a federal prison. If he commits a federal crime, yes we tend to take them away from the state and put them in federal prison, but he's going to have to go out and rob a bank in order to get into a federal [27] prison.

MR. HILGER: All right.

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THE COURT: Ms. Turner.

MR. HILGER: Thank you.

MS. TURNER: Good morning, Your Honor. What I would like to add is we have a couple of problems in this case. First of all, it's a claim for damages because it was brought against two former directors and in the interim of the case which was brought many years ago, both of them retired --

THE COURT: Yes, I gather --

MS. TURNER: -- and that was Mr. Gomez and Mr. Rowland --

THE COURT: -- Mr. Cambra has been added --

MS. TURNER: I'm sorry.

THE COURT: -- I gather Mr. Cambra has been added?

MS. TURNER: No, Mr. Cambra was never served with a copy of the complaint. Mr. Cambra is the only person however, who could effect an injunctive relief because neither of those two directors have any -- had any connection.

THE COURT: You may want to pay attention to that one Mr. Deixler. Go ahead.

MS. TURNER: So as to the issue --

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THE COURT: I read the papers I assumed that Mr. Cambra was a defendant, he was referred to at one point as a [28] defendant.

MS. TURNER: Yes, he would be the only one under Rule 25 if the -- you know, if you do have a claim for injunctive relief and you have the -- lost the person in this case the directors -- we've lost a couple since then, there's been actually two in the interim for Mr. Cambra and on top of that Mr. Cambra has since retired. However, he has --

THE COURT: Oh, fine.

MS. TURNER: -- he has agreed to stay on until his replacement can be picked.

THE COURT: Okay. Well there also suing you under 1983 for damages.

MS. TURNER: They're suing the former directors, they've never served Mr. Cambra and the former directors have long since gone and I don't believe he has established any claim for damages against the former directors. Which is why I asked that they be dismissed under a qualified immunity argument.

I understand if we are going to go on -- however I would like to address that, carry the case forward, it would be only an injunctive claim unless he would be -- you know, Mr. Cambra or his successor is sued for damages. Beyond that they never brought him in for damages.

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THE COURT: Well okay --

MS. TURNER: And I don't believe there are any [29] damages.

THE COURT: -- I didn't see that raised in your papers.

MS. TURNER: I raised the rule -- I raised it in my motion for summary judgment and I always refer to him in his official capacity and we did raise it with Judge --

THE COURT: Judge Marshall.

MS. TURNER: Judge Robbins.

THE COURT: Oh --

MS. TURNER: Excuse me we've always been before Judge Robbins until today.

THE COURT: Well, Judge Robbins, you mean Magistrate Judge Robbins?

MS. TURNER: Yes, Magistrate Judge Robbins.

THE COURT: Well okay --

MS. TURNER: We raised it on the record with him and --

THE COURT: He handles the discovery.

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MS. TURNER: Yes, yes.

THE COURT: But he wouldn't have anything to do with the pleadings. You're going to have to take that one up with Judge Marshall.

MS. TURNER: Okay. Yeah well under Rule 20 --

THE COURT: I gather Judge Marshall in effect inherited the case when Judge Wardlaw went on to the 9th [30] Circuit.

MS. TURNER: Yeah. Too bad she didn't get to sit in on that case up in the 9th Circuit too.

THE COURT: Well, she may see it again.

MR. TURNER: Your Honor, I believe that the *Turner* analysis which -- that is an absolute, you do understand the case and I do appreciate that that you have reviewed it for that. But I believe it's a decision for the Court to make, it's very difficult and actually if this is only a case for injunctive relief, it will be a Court issue most likely, I don't see that going to to the jury.

THE COURT: But you can't call, even if there are court issues, you can't call them on summary judgment if there are fact evaluations to be made.

MS. TURNER: I understand that.

THE COURT: That's your problem.

MS. TURNER: I understand that, but under *Turner* it's for the Court to decide whether there is a valid rational connection between the policy and the penalogical interest. We understand the penalogical interest --

THE COURT: Okay but factual items go into that determination.

MS. TURNER: Yes.

THE COURT: I don't get to declare that on summary judgment. I can read all these papers and have opinions as to [31] how the case may come out.

MS. TURNER: Well and --

THE COURT: I cannot implement those opinions --

MS. TURNER: I believe you can.

THE COURT: No I can't, because what you've got is and you've got to make here an evaluation of the reasonableness, if I can put it that way, of the policy first at the inmate reception center --

MS. TURNER: Okay.

THE COURT: -- where they keep them segregated by race, I think it's a fair summary although it's fuzzed up with they don't put two smokers together And they don't -- they want to make sure they're reasonably close in age so they'll be compatible and that type of thing. Those are also factors,

but -- and they make it very clear that they do not two people with different races together during the first sixty day evaluation period.

And then apparently for an unknown period when a guy arrives at the final resting place so to speak, the institution designated by the inmate reception, there's another initial period of the evaluation before he's subject to this cellmate selection process. Then you've got a question, a factual question which has got to be evaluated of whether that is something that exists in the real world. Mr. Johnson in his declaration says, no he was never told that. [32] And he's been in an awful lot of the institutions run by the State of California over his fifteen year period and he's never been offered his -- never been told he had a choice of cellmates and in fact he's just been celled together with another person of the same race.

As against the testimony of the -- I think it was mainly the assistant warden, one of the directors, that an inmate may select a cellmate, who if agreeable, that they will do their best, which is apparently the normal routine to put them together. Now, whether that is a sufficient answer to your *Lee* doctrine is I think, another question for your trial judge.

MS. TURNER: Well, Your Honor --

THE COURT: And not to be called by a Judge on summary judgment. Now if you and I and Mr. Hilger went into chambers and sat down and discussed it we might come up with a reasonable solution. But can't do it that way.

MS. TURNER: Yeah, I understand. Well, Your Honor, I don't think -- I'm not certain if Mr. Johnson knew or not. Mr. Johnson has very low IQ unfortunately. He -- it's -- but certainly --

THE COURT: Yes, I saw that in the record.

MS. TURNER: -- yeah and I don't know -- and I talked to him at his deposition and we talked fairly frank and told him and he didn't seem to know.

[33] THE COURT: How did -- he may have a low IQ, but he wrote a complaint that can, that got past the 9th Circuit.

MS. TURNER: Hey, he beat me, that's for sure. But you know, just with this one individual and there are a hundred sixty thousand in the Department of Corrections right now --

THE COURT: Right.

MS. TURNER: -- there is successful integration, there is indeed and I presume that's going to have to be brought out in trial. I believe the wave of the future possibly will be that they will completely just perhaps disregard race into -- in housing. I don't know, but I know right now they say it rational that they cannot do it. It would be irrational for them to take any other steps given the crime and the violence in prison already that they cannot control.

THE COURT: At the inmate reception center --

MS. TURNER: Yes.

THE COURT: -- down in Chino, let's say you have two people both of the black race, one has a history of being a member of the Crips and one has a history of being a member of the Bloods, if this is known to the prison officials --

MS. TURNER: Yes.

THE COURT: -- they don't put them together.

MS. TURNER: No, and if it's known they do not, no. [34] And if they find out they take them out probably. How -- it is you talked about colors is one way that it is known, the inmates know. Sometimes it's a pin, it's you know, the blue tip versus the black tip sitting in their pocket, but the inmates know -- tatoos of course are various obvious. But no, they don't want to have violence inside the cells. The cells are only -- they're what --

THE COURT: Well, yes.

MS. TURNER: -- six by eight feet I think and you have two men in them --

THE COURT: There's been some lawsuits about double celling cells originally designed for --

MS. TURNER: Yes, there have.

THE COURT: -- single prisoners in this court.

MS. TURNER: And the Supreme Court did not have *Turner* when it decidedly and it was a very -- *Lee* just fits on

one page, the actual opinion, it's a very, very short addressing of the issue that was before it and I don't know -- I'm certain that perhaps in the South there were prisons that were -- segregated completely I mean, one hundred percent, that would be my suspicion --

THE COURT: Yes.

MS. TURNER: -- seeing this case in 1968 rising up to the supreme court like that.

THE COURT: Yes.

[35] MS. TURNER: Yeah. And now we have --

THE COURT: No doubt. And in fact apparently if you looked and read this 5th Circuit case apparently it's still going on -- was going on in Louisiana until the 5th Circuit stamped on it very hard.

MS. TURNER: Yes, and that starts to say that there is disparate treatment, I mean you have two people who are being treated differently. In this case everybody is treated the same it's just that you know, probably the ideal situation is to select your own cellmate. Mr. Johnson does know of the practice now, it's really not a -- it's a policy for selecting your own cellmate and he still hasn't done it, he's never done it. He's now at a new institution, he can find someone whom he's compatible with from any race.

And I believe that is a rational response to the problem. And I almost feel you know, I feel that they have done a

good job at the Department of Corrections to implement that and to -- and I've seen in seven years that I've been with the prison law office there in the Department of Corrections, I have seen them try very hard to minimize the violence. And I believe that this is doing everything that they can and I don't want -- I would like to the see the Court exercise its powers under *Turner* where it is a Court decision and just determine simply that it's not irrational. That's all they have to do, you don't have to agree with it, they [36] don't have to agree with it, the public doesn't have to agree with it, you just have to determine that it's not irrational. And that's what the Supreme Courts is holding in *Turner.*

THE COURT: Here's the problem, on the facts that I've got here, I can't make that call. I think your trial judge is going to need to make that call based on more facts than we have in this record.

Now for example, and you know when I was a Superior Court judge I visited the inmate reception center, I know what it is, I know what it looks like, I know generally what they do down there and that's described in your papers and they take about sixty days with continual flow of new prisoners coming in everyday to try to classify these people and decide what institution they go with. Some of them even stay at Chino. I gather that's fairly low security prison, at least it was when I visited it many, many years ago.

And I gathered that for fairly low security prisoners where they can live in a dormitory setting, you don't have a problem and there's no challenge to that in this lawsuit.

MS. TURNER: No, they can.

THE COURT: They apparently are fully integrated as the federal law, *Lee* case requires. Now, you've got that first sixty days down at Chino. You're going to have a question of evaluation by a trial judge as to whether [37] a -- what in effect is a segregated system, is necessary to at least for that period for this classification process. And frankly based on what is in here, I can't call it. I think it's got to be called by somebody who has more information about it than I have on this summary judgment papers.

Now next stage, the man is transferred to say Folsom or Calipatria or Lancaster, he again is double celled, apparently with racial classification being one of the more important considerations, I won't call it the only consideration, because the prison officials now want to -- of the institution where he's arriving now want to reevaluate. All right you've got a fact question. Based on the information they have available to them, is that necessary to have that period of -- in effect racial segregation at the new institution. If it is for a limited period of time, in order for the safety of the inmates and the guards which is the argument made by the CDC here, then after that process is finished is there in effect desegregation in the real world. You've got contrary testimony of Mr. Johnson that he never heard of and never saw a two man cell which was integrated in his fifteen year soldiering in the state prison system.

He says it never it happened, well okay. If it never happens is it really a realistic policy that the Bureau of Prisons has or is it purely a matter of self selection and is -- appears self selection sufficient to meet the [38] constitutional task?

Those are questions that I don't think can be answered on summary judgment which is why I'm leaving your second claim --

MS. TURNER: I understand.

THE COURT: -- alive for Judge Marshall to struggle with.

MS. TURNER: Your Honor, would you then also on that though, consider --

THE COURT: By the way, I didn't think much of your argument that he doesn't understand me.

MS. TURNER: Yes, I --

THE COURT: You know --

MS. TURNER: I saw that you didn't think too much of that however, I am looking at it for the injunctive portion of it.

THE COURT: Which portion?

MS. TURNER: The injunctive portion of the complaint.

THE COURT: Okay.

MS. TURNER: You know he's the only one complaining out of a hundred and sixty thousand inmates unless I'm missing something, I know of no other case. And he has never tried --

THE COURT: He's the one the 9th Circuit says he states and claim and it's come back to the District Court and [39] they say take the case up and treat it seriously and appoint counsel to bring order and sense into the case.

MS. TURNER: Well he did state a --

THE COURT: And by God --

MS. TURNER: -- bit of a different claim before he went there.

THE COURT: -- they did appoint counsel who brought order and sense into the case.

MS. TURNER: Yes, they did.

THE COURT: And I want to thank you gentlemen for taking on that duty which must not -- it can't have been a profitable task. Is it basically pro bono unless you win the case, Bert?

MR. DEIXLER: Yes, but we at our firm we say, to much -- to one who much is given much is expected so, that's our responsibility Your Honor, we're pleased to do it.

THE COURT: Yes. Okay, Mr. Deixler was an attorney in a case that really was worth money in my court here a couple of years ago.

MS. TURNER: Well, those are the -- I think that I've pretty much -- I would like you to reconsider on the two

directors who have long since retired and have taken up fishing and swimming and living their lives elsewhere outside the Department of Corrections, since they cannot effect any change in the department and I don't think that he has proven [40] that he has been damaged. I've given them an opportunity to do that and they haven't.

And so for qualified immunity at least to dismiss the two --

THE COURT: But those aren't the tests for qualified immunity.

MS. TURNER: Whether their immune from suit is the test.

THE COURT: Whether they're what?

MS. TURNER: Immune from suit.

THE COURT: Well, yes, but that depends on whether (A) there's a constitutional violation and (B) whether the law was clear at the time constitutional violation took place. That's still an open question and it -- whether their out fishing isn't the question on qualified immunity. Now it may be that the plaintiff doesn't have an interest in keeping him in here for damages and they would prefer to join the present director of the department in order to have the right kind to get an injunction again, I'll leave that up to them to consider.

You might have a talk with Mr. Deixler about that.

MS. TURNER: Well we have --

THE COURT: -- take him up to the fourth floor coffee shop, buy him a cup of coffee and talk about that.

MS. TURNER: We have spoken about that and he is [41] with Mr. Hilger and Mr. Cambra and the former director whoever he is today, tomorrow is in for injunctive relief. But not for damages. Now as to the two that have been sued for damages, they were sued for damages under the 8th, 14th Amendments. The 8th has been dismissed, he has not demonstrated any damage or any harm. And I agree with the 14th --

THE COURT: I'm getting rid of the 8th Amendment claim.

MS. TURNER: Yes, I understand and as with the 14th Amendment claim, he hasn't ever demonstrated any damages or harm by them either. They don't have -- he's never talked to them, never met them, never had any contact with them, never wrote them a letter, never told them that he had any problem with any of their policies. He may have like you mentioned he's suing them on responding on the superior theory of anything. They can't make any changes in the Department of Corrections. And I would ask that it be dismissed as to them.

THE COURT: That's not qualified immunity so I can't do that on summary judgment. All right, I'm going to stick to the tentative ruling. The first and third claims are -- on the defendant's motion are dismissed for on summary judgment.

The second claim, the equal protection claim is left alive and plaintiff's motions are for summary judgment are denied. I don't think -- I think the minute order states my [42] orders clearly enough in that I don't need to have a separate formal order unless either counsel believes and I need it.

MR. DEIXLER: It's not necessary for Mr. Johnson, Your Honor.

THE COURT: Right. Okay I'll mail this off to Judge Marshall and say here, you go Judge Marshall and she'll say, what you couldn't get rid of this case. Thank you, we're in recess.

PROCEEDINGS CONCLUDED AT 11:52 A.M.

APPENDIX Q — CIVIL MINUTES DATED JUNE 14, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 95-1192 CBM (BQR) Date June 11, 2001

Title *Garrison S. Johnson v. State of California, et al.*

DOCKET ENTRY

Priority	___
Send	✓
Enter	✓
Closed	___
JS-5/JS-6	___
JS-2/JS-3	___
Scan Only	___

PRESENT

The Honorable Harry L. Hupp, Judge

Arlene Chavez	**Cynthia L. Mizell**
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Bert H. Deixler ✓
Kenneth Ingber
Hilner ✓

ATTORNEYS PRESENT FOR DEFENDANTS:

Sara Turner ✓

Appendix Q

PROCEEDINGS: CROSS-MOTIONS FOR SUMMARY JUDGMENT

ORDER (also, if applicable, findings and memorandum opinion):

This constitutes notice of entry as required by FRCP, Rule 77(d).

The matter has been transferred to this court for the hearing of these motions only. All further proceedings will be before Judge Marshall.

These are cross motions for summary judgment on plaintiff's Fourth Amended Complaint (4AC). The 4AC has 3 claims: 1st--a § 1983 claim for violation of the Eighth Amendment (cruel and unusual punishment), 2d--a § 1983 claim for violation of Equal Protection under the Fourteenth Amendment, and 3d--a § 1985 claim for conspiracy to violate plaintiff's equal protection rights. Plaintiff Johnson moves for partial summary judgment on his 2d and 3d claims. Defendants Gomez, Rowland, and Cambra move for summary judgment on all 3 of plaintiff's claims. Plaintiff's motion for partial summary judgment is denied, the court finding triable issue of fact on the 2d claim and that defendants are entitled to summary judgment on the conspiracy claim. The motion of defendants Gomez, Rowland, and Cambra are granted as to claims 1 (Eighth Amendment) and 3 (conspiracy) and denied as to claim 2 (Equal Protection). Further, the motion of said defendants for dismissal based on qualified immunity is denied. This minute order is the court's order on these motions. No more

formal order is necessary. The result is that claims 1 and 3 of the 4AC are dismissed, and the case should go to trial on Equal Protection and (as to the individual defendants) on qualified immunity.

At stake are the housing practices of the California Department of Corrections (CDC) in housing inmates of differing races. Plaintiff challenges what he alleges to be discriminatory housing practices by CDC in double celling (where 2 inmates are housed in one cell). He alleges that during the administration of 2 former directors of CDC (Gomez and Rowland) and of the present director (Cambra), there is a practice of housing inmates together in double cells based on race--that is, that double celled inmates are by policy always housed together with an inmate of the same race. Plaintiff, Mr. Johnson, is an experienced inmate, having been an inmate since 1986 after conviction for murder, robberies, and ADW. He has been through the inmate reception center at Chino, and subsequent state prisons at Folsom, Calipatria, and, now, Lancaster. At each facility, he was double celled with another black inmate. He has never made a request to be celled with a named person of another race, so there is no evidence against the reality of claimed CDC policy of allowing same if requested.

The evidence is not in great dispute as to many items. CDC acknowledges that at the inmate reception center, and upon transfer to each new institution, a defendant is normally initially double celled with an inmate of his own race. After initial evaluation (about 60 days at the inmate reception center), if the prisoner is of a security level to be placed in a dormitory facility, he lives in a desegregated facility. If he is

double celled, he and another inmate (of whatever race) may request to be celled together, and this request will normally be granted. However, defendants do not deny that the initial placement is heavily based on race and gang affiliation (to the extent the latter, if any, is known). (Other factors are also considered--smoking, age, record of violence, etc). This initial placement is justified on facts, known to the prison officials, of heavy influence of gang background on prisoner behavior. Thus, there are major safety concerns of placing known members of gangs in the same cell with known members of rival gangs. With regard to initial placement, the prison officials say that immediately on arrival at the inmate reception center, or on arrival at a new prison, the officials cannot know the relevant history; hence they use the safest method of normally placing members of the same race together (presumably not placing Crips and Bloods together). This is based on a factor believed by prison officials--that gangs are normally already self segregated by race (i.e., Mexican Mafia, Aryan Brotherhood, Crips, Bloods). Thus, the initial placement is to recognize these realities until studies, investigation, experience, and classification can tell them otherwise. Moreover, there is an issue of fact as to whether, following classification, the CDC follows a policy of desegregation, or merely allows self selection among prisoners desiring desegregation (plaintiff testified that he never saw a desegregated two person cell; on the other hand, he never asked for one).

There are a number of cases on this problem, but the two most important are *Lee v. Washington*, 68 390 US 333, 19 LEd2d 1212 and *Turner v. Safley*, 87 482 US 78, 96 LEd2d 64. *Lee* established the principle that segregation violates

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Equal Protection inside prison as much as outside it, with the significant caveat that ". . . prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Turner* makes it clear that "strict scrutiny" does not apply; the test is one of deferential review. Under *Turner*, 4 tests are applied: 1. A rational relationship between the regulation and the governmental interest at stake, 2. Any alternative means available of recognizing the right in a prison setting, 3. The impact of recognizing the right on prison resources and guards, and 4. The availability of ready alternatives. The important question here is how to apply these tests to the Equal Protection argument. In the court's opinion, they cannot be applied in a summary judgment setting. From defendant's papers, they are most concerned about prisoner safety related to racial gang antipathies. The logical method, if feasible and possible, is to determine at an early date whether any two prisoners are subject to relevant gang connections (these also may be between two members of the same race, i.e., Bloods and Crips, or (see declaration of O'Neill) between Northern and Southern Hispanics). If segregation temporarily is permitted pending classification, the basic rule is still integration under the *Lee* case; there is a question of fact as to whether it is carried out in the CDC. Accordingly, the motions of each side for summary judgment on the Equal Protection claim is denied.

Cruel and Unusual Punishment is inapplicable here. Mr. Johnson has undergone no hardship and he expresses no dissatisfaction with his cell-mate or injury to himself except for a policy with which he disagrees. If his rights have been

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violated, it is under the Equal Protection Clause, not the Eighth Amendment. The 1st claim is dismissed.

Mr. Johnson has standing to sue for a violation of Equal Protection, as held in the District Court opinion in the *Lee* case and affirmed by the Supreme Court. This part of defendants' motion is denied.

There are no facts showing conspiracy. The CDC has had the same policies through the administrations of three directors. This does not show that they conspired with one another. The conspiracy count must be stricken.

The court is not ready to grant qualified immunity at this stage. *Lee* established that Equal Protection applies to housing of prisoners. *Turner* stated the tests to be applied. There is no lack of law on which a finding of qualified immunity could be based. How the facts play out in trial will determine whether qualified immunity is a viable defense. That portion of defendants' motion is denied.

At the recommendation of the Ninth Circuit (when reversing dismissal of the case following the Third Amended Complaint), the court requested plaintiff's lawyers to take on the case. The court expresses its appreciation to plaintiff's counsel for the order and logic they have brought to the case.

APPENDIX R — HEARING TRANSCRIPT OF DEFENDANTS GOMEZ AND ROWLAND'S MOTION FOR RECONSIDERATION OF DENIAL OF QUALIFIED IMMUNITY DATED JULY 30, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES, CALIFORNIA

Case No. CV-95-1192-CBM
(BQRx)

GARRISON S. JOHNSON

Plaintiff

vs.

STATE OF CALIFORNIA

Defendant

Los Angeles, California
July 30, 2001
10:18 a.m.

DEFENDANTS GOMEZ AND ROWLAND'S MOTION FOR RECONSIDERATION OF DENIAL OF QUALIFIED IMMUNITY

THE HONORABLE HARRY L. HUPP, PRESIDING
UNITED STATES DISTRICT COURT JUDGE

Appendix R

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PROCEEDINGS BEGIN AT 10:18 A.M.

(Court is Called to Order)

THE CLERK: Item Number 3, CV-95-1192 CBM, Garrison S. Johnson versus State of California. Counsel, please state your appearances.

MS. TURNER: Sara Turner, Deputy Attorney General on behalf of defendants.

THE COURT: All right.

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MR. DEIXLER: Good morning, Your Honor. Bert Deixler on behalf of Garrison Johnson.

THE COURT: Right. Mr. Deixler the -- appeared to me the Supreme Court kicked over the dope bucket on us after the last hearing and that's what we mainly have to deal with here.

MR. DEIXLER: Yes, I think we do and let me start by dissenting from your fundamental starting point. I don't read the, I'll call it the *Saucier*, I don't know if it's pronounced that way or not --

THE COURT: Well that's what I've been calling it.

MR. DEIXLER: The *Saucier* case applies at all in the context which we find ourselves. That is a 4th Amendment excessive force case.

THE COURT: Yes.

MR. DEIXLER: In which the starting point of the analysis is the notion of haziness of the lines and where can [4] we draw the lines. And having myself tried such cases on behalf of municipalities I understand, as well as having been a federal prosecutor, I understand that world pretty well. And understand why in that context that we may have a standard.

And I also understand very well the notion of immunity and the notion that is supposed to be an immunity from suit and not just an immunity from trial.

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THE COURT: Right.

MR. DEIXLER: But even, God help us, these five justices, even applying their analysis --

THE COURT: Was that a five to four decision?

MR. DEIXLER: It was five to three to one. If you can try to reconcile it, it's a little difficult.

THE COURT: Yes.

MR. DEIXLER: But even applying the analysis which they offer in the context of Johnson's case seems to me that this is a case in which the Court's initial ruling was exactly right and the law of the 9th Circuit and the Supreme Court hasn't been affected in any way by *Saucier*. And I'd like to just sort of look at the --

THE COURT: Except that they reversed the 9th Circuit.

MR. DEIXLER: I understand that. I understood they reversed the 9th Circuit in the context of that case.

[5] THE COURT: And *Saucier*, which I gather is not a unique event.

MR. DEIXLER: It's happened before I've --

THE COURT: Yes, right. But this whole qualified immunity doctrine, particularly in the 9th Circuit, has a history. And as you may recall it started with the *Harper*

case back in the Nixon administration and then *Creighton against Anderson* and then *Harper* against somebody a non -- a summary decision and unite which left, all of those decisions left the trial court somewhat at sea as what you do when the facts, the basic underlying facts are in dispute. Now, in act of *Portland* Judge Hall tried to lay out a formula for the trial courts to follow in a very -- it was a very difficult process because of the way the Supreme Court had left the case particularly in *Harper*.

But Judge Halls opinion in act *Up* left it that were the basic evidentiary facts concerning the application of the constitutional doctrine at stake, whatever it was, were a dispute the trial judge should get the jury to determine not just all the facts which is what a jury normally does, but the evidentiary fact issues which would allow the trial judge then to apply the qualified immunity doctrine. Then that was followed by, in the 9th Circuit by a series of cases in the excessive force area. Where the allegation is that the police officer used excessive force in conducting an arrest or a [6] detention or in some way used excessive force on the plaintiff in violation of the 4th Amendment as you say.

And the 9th Circuit eventually came to the conclusion in a couple of cases, that since excessive force has to be defined as the application of an unreasonable degree of force necessary to secure the arrest and that the qualified immunity doctrine was what a reasonable officer in the circumstances would believe was necessary force to secure the arrest, that these were obverse sides of the same coin and in effect held that the trial judge should submit the excessive force issue to the jury. They did this in a case or two before *Saucier*

and again did it in the *Saucier* case itself. At least the trial judges thought we had a formula, not a very easy one to apply because you normally don't submit evidentiary fact issues to a jury. You submit ultimate fact issues to a jury, nevertheless, the language of *Harper* and *Anderson against Creighton* seemed to require result that Judge Hall outlined in act *Up*.

I didn't write all of this in the tentative ruling, but you see I've been through it --

MR. DEIXLER: I recognize your familiarity --

THE COURT: -- then here comes *Saucier* and Justice Kennedy in that opinion says the 9th Circuit has it all wrong, you do not send these issues to the jury, the trial judge determines them before trail. He doesn't expressly say that [7] the trial judge makes evidentiary fact rulings when the facts are disputed. But then he proceeds to do precisely that in the *Saucier* case. And the five man majority analysis the facts of the alleged excessive force and said this isn't excessive force when the police officers were alleged to figuratively speaking, grab the demonstrator by the scruff of the neck and the seat of the pants and heaved him into the van. That may not be exactly how it was described in the opinion, but that's what they were alleged to have done. And that was alleged to have been excessive force.

And the Supreme Court proceeds then to make the factual determination that this was not excessive force. Well where does this leave us? Again, they reemphasize their language that qualified immunity is a doctrine that is designed to

prevent a defendant from having to go to trial. And they were emphasized that in saying the 9th Circuit was all wet in saying you ever submit this question to the jury. Apparently saying that at any rate.

And apparently, even though they don't expressly say so, make it necessary for the trial judge to determine these factual issues on motion prior to trial. This doesn't make much sense to a trial judge, I'll have to admit and in fact Bill Norenson (phonetic), one of his descents in one of these excessive force cases pointed out the practical difficulties that the trial judges have in applying qualified immunity. [8] And he was right.

But nonetheless, that's what the Supreme Court seems to be saying. So come down to this case you have two directions of the CDC, California Department of Corrections, who have in effect administered policy which is alleged in this lawsuit to be unconstitutional. And where there is a good argument that it is unconstitutional under the *Lee* case by the standards given to us in the *Turner* case and that there's a very good argument that this initial segregation until they find out more about the individual, does violate the principles of the *Lee* case.

There's that caveat in the *Lee* case which does throw a little dust in the air as to whether in a particularized circumstance a prison official may consider racial tensions, I think was the way the Supreme Court put it, as a -- in making their decision. All of which leaves a little uncertainty floating in the air as to whether the policy alleged to be followed by the Department of Corrections violated the equal protection

clause. Which I said on the first time around here and therefore said was a triable issue of fact.

And then here comes *Saucier* and says, uh uh Judge at least as far as qualified immunity goes that doesn't cover your injunction claim against the present director of course. But at least so far as the claim for damages goes under qualified immunity the judge has to decide it on the motion. [9] Not planning to go to trial if there's any doubt whatsoever in either how the facts apply or what the law is, I gather there's some doubt on both issues here.

Now Mr. Deixler, I'm sorry to give you this long -- I'm sorry to get up on my soapbox and give you this long tirade on qualified immunity. Frankly, I don't think the Supreme Court has recognized the practical problems that the trial courts have in applying their doctrine. But far be it from me to criticize the Supreme Court. My job is to apply what they say if I can figure it out. And so that's what I'm trying to do here.

MR. DEIXLER: I don't in the slightest, question your good faith analysis. And if you would just let me have my two minutes on the soapbox I would love to persuade you.

THE COURT: Of course. Hey, I always like to listen to your arguments because they're always so cogent. Go ahead.

MR. DEIXLER: Puts too much pressure on me, Your Honor. I'm prepared to accept virtually everything that Your Honor has said with regard to the history and much of what the Court has said with regard as well to the equal protection

cases that we're analyzing. But I don't think *Saucier* is as bad for me as Your Honor does. And I think setting aside my general observation that the 4th Amendment area is unique in this kind of analysis, I think if you take *Saucier* on it's own terms it's not quite as blunderbuss as Your Honor has [10] summarized it to be.

I think it sets forth a test which if applied here in conformance with it's peculiar articulation, still allows me to go on in this case on behalf of Mr. Johnson. And let me just see if I can analyze what I think are the key charging paragraphs of this piece of Supreme Court work.

The first inferring must be whether a constitutional right would have been violated on the facts alleged. And I think in this case on the facts alleged there's a constitutional violation. Second, and again all of the facts are to be construed strongly in my favor --

THE COURT: Right and I accepted that proposition in my minute order here.

MR. DEIXLER: Second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals. And that seems tome to be a broad articulation without much substance until we explore it a little bit. And what they do is they wander in the wilderness here on this facts, is say take into light most favorable to the party asserting the injury, did the facts alleged show the officer's conduct violated a constitutional right. Which I think restates what they've said before and re-frames it slightly differently.

And then they go on to say the relevant disposit of [11] inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in a situation he confronted. And then they go off into 4th Amendment type analysis and they say we're going to assume a constitutional violation, but this is close enough for us to apply the broad policy of immunity.

So it seems to me the Court's analysis ought to be whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. And that's really the test the Court is asked to apply here, a difficult test I concede. But one which in light of cases starting as early as 1974 in Ohio, 5th Circuit case in 1994 and almost the blue Buick type facts were the ones we confront here. The justification offered for this segregation in its policy, in the broad way that it has been articulated factually in this case, has been rejected.

So we have twenty years-ish of constitutional teaching which tells us that a reasonable officer would have known that the positions articulated, the CDC head, the position articulated are unconstitutional that there must be a much more fact specific justification then the justification which was offered in this case. Now it may be that Your Honor is exactly right, at the time of the trial in cross-examination that they'll be able to hone in their argument and they'll be able to point to some specifics.

[12] But on the factual presentation which was made by the attorney general in this case it was this broad kind of airy

concern about maybe something could happen and therefore we're going to segregate our prisoners. Well that's not constitutionally permissible. And so I think under *Saucier* I still get a shot to put this case on. The attorney general gets to put the case on and if there are specific facts that are going to justify it, I'm going to loose. And the earliest time the qualified immunity properly could be applied is after Your Honor perhaps, hears the explanation offered at the time of trial, listens to it and evaluates it. You may not need to go beyond the jury.

But on the evidence which was submitted in opposition to our motion I submit Your Honor, and invite the Court to go back again on the facts. I think that we're here for a trial.

THE COURT: The problem is that in writing the *Saucier* opinion just as Kennedy reached back to *Creighton against Anderson* and the *Harper* case and what was the original, *Harlow* case.

MR. DEIXLER: Right.

THE COURT: And reemphasized what looked to me like figuratively exclamation points, that qualified immunity is a doctrine which allows a defendant if there's any real doubt to not go to trial. The government defendant doing exercising [13] discretionary functions. And the trouble is he's saying I think not only from how they phrase it, but what they actually did in the *Saucier* case, that it's up to the judge to make those factual calls prior to trial as to whether it's possible the defendant could win the case and if so the defendant is entitled to qualified immunity --

DEIXLER: I don't disagree with Your Honor.

THE COURT: -- he's really cutting the heart out of the 1983 actions by doing this. Because he's applying in an excessive force case where the difference between the plaintiff's burden and the defendant's burden is so thin that I can't see a difference between the two. They look to me as I posed it earlier, like adverse sides of the same coin, but the defendant has the burden on qualified immunity and the plaintiff on excessive force and it's the same issue. And he says you don't put that to the jury, if it's arguable.

Now, here the defendant has an argument about their concerns about racially oriented gangs in prison and the possibility of putting two people in the same cell who are members of enemy gangs is articulated as the reason for this policy of at least in the inmate reception center and then at the start of the period where a new defendant, a new prisoner comes into a new state prison, of taking a period of time to study the individual characteristics of this defendant. It's an argument that *Lee* leaves at least open a small knot hole, [14] maybe even a little larger crack, to crawl through as a defense.

Since it could be applied as I read *Saucier* I have to say, qualified immunity applies and that leaves you with your action for an injunction but not for damages.

MR. DEIXLER: Well, I certainly have understood the Court's rational, but again I have two points of dispute --

THE COURT: You see *Saucier* doesn't go that far.

MR. DEIXLER: -- I do not believe -- *Saucier* doesn't go that far, but I'll put that aside for the moment and just argue the facts of the summary judgment motion and see if I can't persuade --

THE COURT: Okay --

MR. DEIXLER: -- you on that one. Plan B here. The argument articulated in the opposition to the summary judgment motion --

THE COURT: Yes.

MR. DEIXLER: -- fails as a matter of law because it's this generic one size fits all, anything's possible, you put two black people together they could kill each other, that's the substance of what they said and it's no more specific than that. That argument cannot win we know as a matter of law, that's not a viable legal defense. If they said, we looked at Garrison Johnson and we look at his tattoos, we looked at Garrison Johnson's past history on the [15] street, then we're having a specific conversation about a specific person.

THE COURT: True.

MR. DEIXLER: And then I understand the factors which apply and I loose. But on the facts which were advanced in opposition to our motion in this case, it was the generic and legally insufficient argument. If that's so, if that's the best they can do given the prescience, then Justice Kennedy says that the test is whether it would be clear to a reasonable officer, that his conduct was unlawful in a situation

he confronted. They should know that generic one size arguments are no good, that it's not enough, that it has to be specific to engage in racial segregation as an act of governmental policy.

THE COURT: Remember that their position is that they only do this on initial receipt of the defendant until they can evaluate the particular person. They are not saying that for all times during the whole prison set up --

MR. DEIXLER: I certainly understand that has been their factual determination, but focused on that issue still it's undifferentiated racial discrimination without specific facts to support it and the law tells us you can't do that. You just can't say, put these two black guys together willie nillie. You just can't do that this -- it's not permissible. And that's what they said they've done.

[16] THE COURT: You know Mr. Deixler, I found you very convincing and I suspect you may have a very convincing argument in Judge Marshall's court for this case of course, by the time it comes up. *Lee* however, leaves it not quite clear exactly what they can do with regard to racial tensions because of the -- what I call the *Lee* copy-out.

MR. DEIXLER: I understand.

THE COURT: Which let's see -- prison authorities have the right acting in good faith and in particularized circumstances, whatever that may mean, to take into account racial tensions in maintaining security, discipline and good order in prisons and jails.

Now what these two directors or retired directors of the Department of Corrections say they do is, initially segregate and they agree that they do segregate by race and also attempt to keep rival gangs in the same race apart at -- for the first period of time at the inmate reception center, which I understand can be up to sixty days in Johnson's case I gather it was twenty-three days, until they find out about whether there is a problem. And it says, thereafter we will allow prisoners to select their own roommates and if it's reasonable we'll approve it, of whatever race. Those are for inmates that aren't in dormitories, which are all of course, desegregated, were in single cells for I protective reasons in effect are -- in a way your segregation [17] problem doesn't arise.

That's what they say. They have an argument that can be made, it's not flat out unconstitutional, you still have to win the case as to whether that's a reasonable argument. The difficulty is that when you come to applying the term reasonable in a qualified immunity case, as the Supreme Court I think made clear in the *Saucier* case by knocking over what the 9th Circuit has said about the rule of reason in excessive force cases, in saying we're going to decide it ourselves as a matter of law. They're saying these things have to be decided by the trial court, not as to whether there is a constitutional violation, but whether there's an argument at the pre-trial level.

Now, the 9th Circuit has been bucking I might say, quick against *Anderson* and *Harper* since it first came out and Judge Hall packed up and tried to find an accommodation with the foreman of those cases. Then the 9th Circuit carried it a little

further in excessive force cases and the Supreme Court did what they usually do, they slapped them down and said no way, we don't mean this. Declare a pre-trial on motions and that's what they did in the *Saucier* case.

Now, if you told me whether there's an issue of fact when the police are alleged to have taken the defendant and flung him into a van, that that's not a triable issue of fact on excessive force and you've come to me with a summary [18] judgment on that ground, I'd just in effect say har har, of course it's a triable issue of fact. What did the Supreme Court do? They decided the triable issue of fact. They said, well it wasn't serious enough in this case to rise to the level of excessive force, they're making their factual determination and they're saying the 9th Circuit should have done that and not allow the case to go to trial.

I think that they have revamped the 9th Circuit's approach to what qualified immunity is in these 1983 cases. Saying hey we meant what we said in *Anderson* -- was it *Anderson against Creighton* or was it *Creighton against Anderson*? I forgot which way it was --

MR. DEIXLER: Yes, Anderson.

THE COURT: -- and the *Harper* case which the 9th Circuit has never really believed ever since. I think we're there.

MR. DEIXLER: Well, Your Honor, the difference between Sisyphus and myself is that he didn't know when to stop. So I'm going to just submit it, Your Honor.

Appendix R

THE COURT: Mr. Deixler, I thank you, I appreciate your argument.

MR. DEIXLER: I appreciate your attention to the issue.

THE COURT: I think if you can take this to the 9th Circuit, if they're not shell shocked by now, maybe they'll [19] put it back.

MR. DEIXLER: Very well, Your Honor.

THE COURT: Ms. Turner, you want to comment on all this.

MS. TURNER: Well, no I know when to stop too, but I also just think that you know government attorneys are obviously were waiting for the decision in *Saucier* and it just happened to come that same week that we had been here arguing --

THE COURT: One week to the day after I decided the motion in the first place.

MS. TURNER: Well we did know it was out there and we were waiting for it. I know the Supreme Court usually rules before the 4th of July so. I do think though that the principal one that is very difficult in qualified immunity is that it's to permit officials which is what *Harlow* said to undertake their responsibilities without fear they'll be liable in damages for actions that appear reasonable at the time, but were later held to violate statutory or constitutional rights.

Appendix R

THE COURT: Yes. The way the Supreme Court is taking it they have taken it a step further. Because you can have qualified immunity and subject that to fact finding procedures in theory, by a jury deciding the evidentiary facts. And the Supreme Court says, no, this is a doctrine [20] designed to prevent the official from having to stand trial.

MS. TURNER: Right. Yes.

THE COURT: And then --

MS. TURNER: It's true immunity.

THE COURT: -- as I, of course you know I'm talking to the converted here, I couldn't convince Mr. Deixler on this one. The applyant (sic) -- now they do not explain, which is one of my principal gripes with Justice Kennedy's opinion, how a trial judge is supposed to administer this doctrine. Are we supposed to make evidentiary fact findings on motions in 1983 cases? Apparently so, because that's just what the Supreme Court did in *Saucier*. They made an evidentiary fact finding that flinging the fellow into the van was not excessive force because they say, well he wasn't hurt very much and maybe a little bruised and that's about it and that's not serious enough to bring a constitutional case under. They're doing fact finding.

MS. TURNER: They said it wasn't excessive, yeah they made a decision.

THE COURT: That's right --

MS. TURNER: Yeah. I don't envy your task.

THE COURT: -- and if I read between the lines of what they did as opposed to how Justice Kennedy failed to explain how the trial court is supposed to do this and you know, it implyably (sic) overrules also act *Up Portland* where [21] Judge Hall in her opinion, tried to set up a way in which this was handled which made as much sense as possible given the language she had to work with out of *Harper* and *Creighton*. She says, if you can grant it on summary judgment, do it. But if you can't and there's a dispute in the evidentiary facts, you submit that dispute to the jury and the jury decides the evidentiary facts and reports those back to the trial judge who then calls the qualified immunity question. That was her best effort to reconcile the problem of trial judges in applying that *Harper* case, which was I think the start of -- nobody was paying any attention to *Creighton against Anderson*, but *Harper* came out and all of a sudden the 9th Circuit sat up and they took the first case and they tried to write something that was practical for trial courts.

MS. TURNER: Well, Your Honor --

THE COURT: That's what I thought the law was --

MS. TURNER: Well --

THE COURT: -- until now until and except that the 9th Circuit in excessive force cases says, well it's the same question so you just send it to the jury. The Supreme Court is emphatically as I've ever seen them say anything, said no way. Well okay.

I feel sorry for the trial judge. I gotta change my decision I hear on qualified immunity for Rowland and Gomez and summary judgment is granted as to Rowland and Gomez, I [22] just signed your judgment.

And the case is still alive as to conjunction against the present head of the department of corrections --

MS. TURNER: Okay. All right, thank you Your Honor.

THE COURT: -- but that you can try out before Judge Marshall.

Mr. Deixler, you know, I know you're court appointed in this case and it certainly is not going to be what you might call a lucrative profitable case to take on. I want to say I appreciate your services in this case. Because you brought order and logic to what the 9th Circuit said. This is a mess. Appointed attorney, thank you.

MR. DEIXLER: Thank you, Your Honor.

PROCEEDINGS CONCLUDED AT 10:53 A.M.

APPENDIX S — ORDER GRANTING DEFENDANTS GOMEZ AND ROWLANDS' MOTION FOR RECONSIDERATION AND GRANTING SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY DATED JULY 30, 2001

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION

Case: CV-95-01192 CBM (BQR)

GARRISON S. JOHNSON,

Plaintiff,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

[PROPOSED] ORDER GRANTING DEFENDANTS GOMEZ AND ROWLANDS' MOTION FOR RECONSIDERATION AND GRANTING SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY

This matter having come on before hearing on July 30, 2001, and the Court, having read and considered the motion by Defendants J. Rowland and J. Gomez for reconsideration of denial of qualified immunity pursuant to Local Civil Rule to Rule 7.16, and being fully informed, and finding no just reason for delay, pursuant to Rule 54(b), Federal Rules of Civil Procedure, hereby enters the following order:

Appendix S

IT IS HEREBY ORDERED that Defendants Rowland and Gomez are entitled to qualified immunity and that summary judgment be entered in favor of Defendants James H. Gomez and James Rowland and against Plaintiff herein pursuant to Rule 56, Federal Rules of Civil Procedure and this action be dismissed as to defendants Gomez and Rowland with prejudice forthwith.

DATED: 7/30/01

s/ Harry L. Hupp
United States District Court Judge

APPENDIX T — LETTER FROM TANYA L. FORSHEIT OF PROSKAUER ROSE LLP TO THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED JUNE 26, 2003

PROSKAUER ROSE LLP

June 26, 2003

VIA U.S. MAIL

Clerk of the Court
United States Court of Appeals for the Ninth Circuit
95 Seventh Street, P.O. Box 193939
San Francisco, CA 94103-3939

Re: *Garrison S. Johnson v. James H. Gomez and James Rowland*
United States Court of Appeals for the Ninth Circuit
Case No. 01-56436

Dear Clerk of Court:

This letter serves to advise the Court pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure of the recently issued opinion of the Supreme Court of the United States in *Grutter v. Bollinger*, 2003 WL 21433492 (June 23, 2003). *Grutter* supports Appellant Garrison Johnson's Petition for Panel Rehearing With Suggestion for Rehearing *En Banc* (the "Petition"), currently pending before this Court.

Appendix T

In *Grutter*, the Supreme Court confirmed, in unambiguous language, that "*all* racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter*, 2003 WL 21433492, *13 (emphasis added) (internal citations omitted).

Grutter is relevant to Section II.A. of Appellant's Petition in which he argues that the Panel's application of rational basis scrutiny as enunciated in *Turner v. Safley*, 482 U.S. 78 (1987), a First Amendment case not involving any invidious racial classification, conflicts with decisions of other Courts of Appeal holding that heightened scrutiny is required for race-based prison regulations.

Very truly yours,

s/ Tanya L. Forsheit
Tanya L. Forsheit

cc: Sara Turner, Esq., Deputy Attorney General